Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

KEITH VAN HORNE,

Petitioner,

v.

EVERGREEN MEDIA CORPORATION, a Delaware corporation, and WRCX RADIO,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Illinois

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. In *Cohen v. Cowles Media Co.* this Court held that the First Amendment does not shield the media from laws of general application. In his Complaint, Keith Van Horne alleged that Respondents Evergreen Media Corporation and WRCX Radio negligently hired and retained radio personality "Mancow" Muller knowing, through his history of injury causing and criminal broadcast conduct and speech, that Muller was likely to cause further injury to others in the course of his broadcasts. Does the First Amendment shield Evergreen and WRCX from liability for negligently hiring, supervising and retaining Muller and demand stricter scrutiny than would be applied to enforcement of these torts against other persons or organizations?

2. In *New York Times Co. v. Sullivan* this Court held that proof of actual malice provided the breathing space required by the First Amendment in public figure defamation cases, thus striking a balance between the right of speech and the right to seek redress for injury to reputation caused by defamatory speech. Van Horne, a public figure, alleged that "Mancow" Muller's defamatory broadcast statements were made with actual malice pursuant to *New York Times* and adopted this standard in the negligent hiring, supervision and retention counts against Evergreen and WRCX arising from his reputational injury. Does the First Amendment's "breathing space" also require stricter scrutiny of pleading and proof requirements in enforcing laws of general application, such as negligence, against a media defendant?

PARTIES BEFORE THE SUPREME COURT OF ILLINOIS

The parties before the Supreme Court of Illinois were appellee Keith Van Horne and appellants Irma Blanco, Evergreen Media Corporation, a Delaware corporation, and WRCX Radio. Blanco is not a party to this Petition.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Keith Van Horne respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Illinois, entered in the above titled proceeding on December 3, 1998.

OPINION BELOW

The opinion of the Supreme Court of Illinois is reported at 185 Ill. 2d 299, 705 N.E.2d 898 (Ill. 1998) and is Appendix 1. The Illinois Appellate Court's decision is reported at 294 Ill. App. 3d 649, 691 N.E.2d 74 (Ill. App. Ct. 1998) and is Appendix 2. The Supreme Court of Illinois' notice denying rehearing is Appendix 3. The trial court's order, dismissing Counts V-VIII of the Second Amended Complaint is Appendix 4. The Second Amended Complaint, filed July 7, 1995, is Appendix 5.

JURISDICTION

The Judgment of the Supreme Court of Illinois was entered on December 3, 1998. Petitioner's Petition for Rehearing was denied on February 1, 1999. This Petition for Certiorari is filed within 90 days of said denial of rehearing. This Court's jurisdiction is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the Constitution provides, in pertinent part:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ."

STATEMENT OF THE CASE

"Do whatever you want to do—just entertain, have fun." (App.5, p.57a, ¶58, quoting President of defendant Evergreen Media Corporation's direction to employee Matthew "Mancow" Muller.)

"They've given me a program director who keeps out of my face. I have complete freedom." (App.5, p.57a, ¶58, quoting Matthew "Mancow" Muller.)

Defendants Evergreen and WRCX Radio (collectively "Evergreen") broadcast a radio program known as Mancow's Morning Madhouse throughout the Chicago Metropolitan Area. (App.5, pp.33a, 34a, ¶¶2, 4).[1, 2] Defendant Matthew "Mancow" Muller,[3] is a Chicago area radio personality and host of the program. (App.5, p.33a, ¶ 2.) This Petition concerns a broadcast

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[1] References to the attached Appendices are preceded by the designation "App."

[2] Petitioner's Second Amended Complaint, included as Appendix 5, was pending before the lower court at the time the causes of action at issue were dismissed.

[3] Muller is not a party to this Petition and, at the time of this writing, defamation counts are pending against Muller, Evergreen and WRCX for Muller's statements in the course of the Broadcast and his republication thereof.

of Muller's program on November 11, 1994, between 5:30 a.m. and 10:00 a.m. (the "Broadcast.") (App.5, p.34a, ¶4.)

In the course of the Broadcast, defendants told the Chicago Metropolitan Area listening audience that plaintiff, former Chicago Bear and then WLUP radio personality Keith Van Horne, had waited for Muller to arrive at WRCX studios that morning, and between 5:00-5:30 a.m., attacked Muller and threatened to kill him, while chasing him down the hall with "blood-shot eyes" and "flared lips." (App.5, pp.41a-42a, ¶15.) The trial court found that Van Horne stated a cause of action for defamation *per se* against Muller and Evergreen. This finding was not challenged on appeal.

The Negligent and Reckless Hiring, Supervision and Retention Counts[4]

Van Horne alleged that before hiring Muller, Evergreen knew or should have known of the following conduct of Muller that occurred in the course of his employment as a radio personality in California:

a. obstructing public access to the San Francisco Bay Bridge and causing a three-hour traffic jam involving 35,000 commuters on May 26, 1993 so that Muller's KSOL (n/k/a KYLD) sidekick could get a haircut in a van stopped on the bridge. As a consequence of his conduct and plea of no contest to causing a public nuisance, Muller was fined $500,

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[4] Referred to collectively herein as the "negligent employment counts."

sentenced to 100 hours of community service, and sentenced to three years of probation by San Francisco Municipal Court, and was suspended from KSOL, a direct competitor of Evergreen-owned KMEL. As a further result of his extreme and outrageous conduct, Muller and KSOL are defendants in a $4 million public nuisance class action brought by injured commuters. In the course of his criminal prosecution, Muller apologized in public and stated, in words or substance, that he had "misjudged the power of radio";

b. falsely broadcasting that the Golden Gate Bridge toll had risen from $3 to $5. Bridge officials reprimanded Muller because many KSOL listeners believed Muller's report and overpaid their tolls;

c. hanging a "Welcome to Chicago" banner over the receiving gates during the Christmas rush at San Francisco International Airport and watching travelers panic as they deplaned;

d. dropping cinder blocks off a California Bayshore overpass and causing damage to cars parked below;

e. causing KSOL listeners to storm the San Francisco State University library on March 4, 1994 by announcing during his program that $500 was hidden in a book;

f. designating "Alzheimer's Awareness Day" and visiting a geriatric center in San Francisco to mock aged individuals with the debilitating illness by asking them trivia questions they were unable to answer over the public airwaves.

(App.5, pp.52a, 53a-54a, ¶¶ 46, 48, 49.)

The complaint also alleged the following conduct of Muller subsequent to Muller's hiring at Evergreen but prior to the Broadcast:

> a. declaring a day "Roadkill Tuesday" and offering $103.50 to WRCX listeners who left dead animals at Frankfort's Town Center mall on September 6, 1994; listeners responded by depositing rotting animal carcasses at the mall; as a direct consequence of Muller's conduct, the city had to flush the area with chlorine and 3,000 gallons of water to prevent possible outbreaks of disease; WRCX was fined $500 and charged $505 for the cleanup;
>
> b. directing his sidekick, Turd, to stand on the North Avenue bridge over Lake Shore Drive during Muller's broadcast in or about October, 1994 with a sign that read "Honk and we'll drop a cinder block"; police stormed the WRCX studio and stopped Muller's show; Turd was arrested, fined $800, and sentenced to 120 hours of community service and one year supervision; WRCX station manager Dave Richards was required to provide an on-air apology.

(App.5, pp.56a-57a, ¶¶ 57-60.)

The circuit court dismissed with prejudice all four of the negligent employment counts against Evergreen (Counts V-VIII). (App.4, p.32a.) In its motion to dismiss, Evergreen argued that allowing employment torts to proceed against a media entity where the injury alleged was caused by broadcast speech would result in a chilling effect on First Amendment speech. Evergreen claimed that potential liability for the negligent employment torts would cause media defendants to

"guess" at what broadcast speech and conduct would subject them to liability and what employees they could safely hire.

The Appellate Court reversed and remanded the circuit court's orders on January 30, 1998, thus reinstating each of the negligent employment counts. In so holding, the court stated:

> Defendants express concern that this holding will result in a "chilling effect" on free speech as media companies will be discouraged from hiring controversial broadcasters. We disagree. The issue before us is whether a complaint alleging negligent and/or reckless hiring, supervision, and retention can withstand a legal challenge under section 2-615 of the Illinois Code of Civil Procedure where the complaint does not allege physical injury. As noted above, we find that there is no requirement that physical injury be alleged. Without expressing an opinion about defendants' ultimate liability in the present case, we note that the intent of this holding is not to discourage companies from hiring controversial broadcasters; rather, the intent is to protect innocent persons from defamatory remarks.
>
> Defendants also express concern over the burden placed on the communications industry by our holding. Specifically, defendants argue that this holding could impose liability on employers for not accurately predicting what a broadcaster might say on the air. We do not consider a review of a prospective employee's past to determine his or her fitness for a job as a broadcaster to be unduly burdensome.

(App.2, pp.29a-30a.)

On June 3, 1998, the Supreme Court of Illinois granted Evergreen's petition for leave to appeal. *Van Horne v. Muller*, 699 N.E.2d 1038 (Ill. 1998). In its decision, the Illinois Court reversed the decision of the appellate court as it related to the negligent employment counts. The Illinois Court did not address or acknowledge Muller's propensity for engaging in injury-causing broadcast speech and conduct. Instead, it found "that Muller had previously engaged in offensive or outrageous conduct during his radio programs does not establish that he had a propensity to make false, defamatory statements . . . this conduct was not sufficient to put defendants on notice that Muller would make false, defamatory statements on the air if WRCX and Evergreen hired him." (App.1, p.14a.) Specifically, the Court found:

> The type of prior conduct by an employee which will be sufficient to put an employer on notice that the employee is unfit for a particular position will differ in every case. In this case, we employ a narrow interpretation of this requirement because of the First Amendment concerns which arise when liability is predicated on speech.
>
> * * *
>
> [R]ecognition of this cause of action where the employee had previously engaged only in "outrageous," but nondefamatory, conduct or speech would run afoul of First Amendment principles. The most obvious impact of this rule would be on media employers. Plaintiff's theory would thus hold a media employer liable for its decision to hire or retain a broadcaster simply because that broadcaster was a controversial fig-

> ure, the reasoning being that such controversial figures are "likely" to engage in defamatory speech. Such a holding would have an inevitable chilling effect on free speech, as media employers would be reluctant to hire controversial broadcasters or reporters. The law of defamation must not only protect the individual's interest in vindicating his good name and reputation, but also allow the First Amendment guarantees the 'breathing space' essential to their fruitful exercise." (citing *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)). Imposing liability for negligent hiring or retention under these circumstances would not grant the first amendment guarantees sufficient "breathing space." Whether we would ever recognize a cause of action for negligent hiring or retention based on an employee's defamatory statements is not decided in this case. We hold only that this cause of action may not be premised solely on allegations that an employer hired an employee who had previously engaged in controversial, but nondefamatory, speech or conduct.

(App.1, pp.16a-17a.) Van Horne's Petition for Rehearing was denied on February 1, 1999. (App.3, p.31a.)

REASONS FOR GRANTING THE WRIT

INTRODUCTION

In holding that the elements for negligent employment torts are to be scrutinized more narrowly in actions against media defendants where the underlying injury is caused by a defamation, the Illinois Court ignored controlling constitutional precedent. It instead impermissibly heightened the *prima facia* elements of the torts as applied to the media without regard to either the standard for enforcement of laws of general application as established in *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991) or the standard for liability consistent with the First Amendment for a public figure defamation under *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

The Illinois Court's decision will serve as a license for media defendants throughout the country to avoid liability for laws of general application solely on the ground that speech is indirectly impacted. As a result, this Court's clear pronouncement to the contrary in *Cohen* will unravel under the weight of inconsistent decisions as to whether media defendants are afforded greater protection from negligent employment torts than other employers.

The Illinois Court's opinion ignores the precedent of *Cohen v. Cowles Media Co.* and its progeny holding that torts of general application, such as negligent hiring, supervision and retention, are to be applied against the media unrestrictively and without heightened scrutiny, despite a possible indirect impact on speech. The Illinois Court also failed to recognize that *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)

and its progeny define the protection afforded any speech concerns in public figure defamation cases without the heightened pleading and proof requirements now required by the court. *New York Times* requires actual malice, *i.e.*, allegation and proof with convincing clarity that a media defendant published a defamation with actual knowledge of its falsity or with reckless disregard for the truth. Notwithstanding that Van Horne pled and met the *New York Times* standard of actual malice in each of the negligent employment counts, the Illinois Court further subjected the pleading and proof requirements in a negligence action to a heightened level of scrutiny based solely on the defendants' status as a media entity.

Van Horne's Complaint included allegations of historical acts of broadcast speech and conduct on the part of radio personality Muller, resulting in injuries to third persons in addition to criminal sanctions and civil penalties against Muller, his radio sidekicks and his employers prior to his employment at Evergreen and prior to his defamation of Van Horne. Evergreen thus had actual knowledge that Muller was likely to injure others through his broadcast conduct and speech, but hired and retained him notwithstanding these propensities. Evergreen must be as accountable for its negligence as nonmedia employers; the Illinois Court's opinion erroneously cloaks the media with a special immunity for its negligent acts as an employer.

Certiorari is mandated to clarify the uncertainty created by the Illinois Court's decision and to resolve whether, with respect to their hiring and employment decisions, media defendants are above the law.

I. THE ILLINOIS COURT'S CREATION OF HEIGHTENED PLEADING AND PROOF BURDENS IN NEGLIGENCE ACTIONS AGAINST MEDIA EMPLOYERS WILL EXEMPT THEM FROM LAWS OF GENERAL APPLICATION.

The Illinois Court has subjected laws of general application, *i.e.* negligent hiring, supervision and retention, to stricter scrutiny when applied to the media than are applied against other persons or organizations. In *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991), a case involving media publication of information a reporter promised would not be published, and upholding plaintiff's resulting action for promissory estoppel, Justice White announced the rule which explicitly rejected such deference to the media:

> This case however, is not controlled by [the cases cited by the media] but rather by the equally well-established line of decisions holding that generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news. As the cases relied on by respondents recognize, the truthful information sought to be published must have been lawfully acquired. The press may not with impunity breach and enter an office or dwelling to gather news. Neither does the First Amendment relieve a newspaper reporter of the obligation shared by all citizens to respond to a grand jury subpoena and answer questions relevant to a criminal investigation, even through the reporter might be required to reveal a confidential source. The press, like others interested in publishing, may not publish copyrighted material without obey-

> ing the copyright laws. Similarly, the media must obey the National Labor Relations Act, and the Fair Labor Standards Act; may not restrain trade in violation of the antitrust laws; and must pay nondiscriminatory taxes. It is therefore beyond dispute that "[t]he publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others." *Associated Press v. NLRB*, supra, 301 U.S. at 132-33. Accordingly, enforcement of such general laws against the press is not subject to stricter scrutiny than would be applied to enforcement against other persons or organizations.
>
> There can be little doubt that the Minnesota doctrine of promissory estoppel is a law of general applicability. It does not target or single out the press. Rather, insofar as we are advised, the doctrine is generally applicable to the daily transactions of all the citizens of Minnesota. The First Amendment does not forbid its application to the press.

Id. at 669-70 (internal citations omitted). *See also*, *Galella v. Onassis*, 487 F.2d 986, 996 (2d Cir. 1973) ("[t]here is no threat to a free press in requiring its agents to act within the law").

A. The Fact That Speech Is Indirectly Impacted by Enforcement of Laws of General Applicability Is Not a Basis to Grant a Special Immunity to Media Employers in Actions for Negligent Hiring and Supervision of Broadcast Personalities.

The Illinois Court's opinion contravenes *Cohen*'s mandate by requiring that, in cases brought against the media for negligent employment torts, the element of foreseeability is met only when the employee has previously committed the identical tort. Specifically, the Illinois Court reasoned "we employ a narrow interpretation of this requirement because of the First Amendment concerns which arise when liability is predicated on speech." (App.1, p.16a.) Thus, the Illinois Court held that only if Muller had defamed others in the past would liability attach on a negligent hiring or supervision theory. This departure from long standing constitutional precedent requires clarification from this Court because it grants broadcasters license to avoid liability for laws of general application simply as a consequence of their media status.[5] Moreover, whether or not Muller

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[5] Contrary to the Illinois Court's Opinion, the law in Illinois has never been that an employee must have caused the precise injury in the past to put an employer on notice of his unfitness for the job. Rather, liability attaches as long as the employer knew or should have known that the employee was likely to cause injury to others through his employment. *Johnson v. Mers*, 664 N.E.2d 668 (Ill. App. Ct. 1996); *Bates v. Doria*, 502 N.E.2d 454 (Ill. App. Ct. 1986). As the Court held in *Malorney v. B&L Motor Freight, Inc.*, 496 N.E.2d 1086 (1st Dist. 1986), it is not essential that one should have foreseen the precise injury which resulted from the act or omission. Rather, the injury must be the natural and probable result of

(continued...)

previously defamed others in the past begs the question. Muller's prior criminal, penalty-causing and injury-producing broadcast conduct and speech unquestionably put Evergreen on notice of Muller's particular unfitness as a broadcaster.

Contrary to the Illinois Court's rationale, *Cohen* has served as the touchstone by which courts, until now, have consistently and without qualification applied laws of general application to media entities. *Cohen* and its progeny demonstrate that media entities are held accountable for laws of general application, such as negligence, pursuant to the same standards as non-media parties, notwithstanding the fact that speech is indirectly implicated. *See Anderson v. Strong Mem'l Hosp.*, 573 N.Y.S.2d 828, 830 (N.Y. Sup. Ct. 1991) (First Amendment did not shield news publisher from liability in contribution action arising from tortious invasion of privacy). *Accord Dickerson v. Raphael*, 564 N.W.2d 85, 92 (Mich. Ct. App. 1997) (eavesdropping is a law of general applicability which the First Amendment does not shield and which only has an incidental impact on speech); *Rice v. Paladin Enters., Inc.*, 128 F.3d 233, 243-246 (4th Cir. 1997), *cert. denied*, ___ U.S. ___, 118 S. Ct. 1515 (1998) (criminal aiding and abetting charges were laws of general applicability, only incidentally impacted speech and were to be fully applied even though liability was predicated upon defendants' media publication); *Food Lion Inc. v. Capital*

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[5] (...continued)
the negligent act or omission such that an ordinary and prudent person ought to have foreseen as likely its occurrence as a result of the negligence.

Cities/ABC Inc., 984 F. Supp. 923, 929 (M.D.N.C. 1997) (rejecting the propositions that (i) laws of general application should not be applied against media defendants; and (ii) such application would have a chilling effect on news gathering which would violate the First Amendment).

The Illinois Court's opinion invites the very trammeling of rights *Cohen* and its progeny preclude. Rather than applying established precedent to the facts of this case, the Illinois Court created a new rule of law which redefined the elements of the negligent employment torts based solely on the defendants' media status. It held that Muller's conduct could only have been foreseeable if he had committed the identical tort in the past. Media defendants will now seize this opportunity to argue the erosion of the holding in *Cohen* and the creation of a protected status for media entities, insulating them from liability for their negligence in hiring and retaining dangerous employees such as Muller.

B. The Illinois Court's Opinion Conflicts with the Decisions of Other Courts and Will Invite Disparate Rulings as to Whether the First Amendment Is a Shield Against Liability for Negligent Employment Torts Lodged Against Media Defendants.

The Supreme Court of Illinois's decision is a dangerous step toward the dismantling and evisceration of *Cohen* and has provided media defendants an unconstitutional shield against persons injured as a result of broadcast speech or conduct. The Illinois Court's shift

in liability and constitutional precedent is such that other courts will have a basis upon which to grant the media protections neither intended nor recognized by this Court.

The rationale of the Illinois Court appears to be the following: Since Muller, as a radio personality, is routinely engaged in speech on an occupational basis and the underlying tort in this case, defamation, is speech-based, the First Amendment must supersede generally applicable law to permit media employers the right to hire controversial personalities. The Illinois Court's raising the bar of the negligent employment torts to accommodate the media is impermissible under *Cohen*. As laws of general application, these torts may be asserted against Evergreen notwithstanding an indirect impact upon speech.

Evergreen is not being sued for its speech—it is being sued for not exercising ordinary care in its hiring and supervision of employees. Thus, the obligations of Evergreen are the identical obligations the law imposes upon any employer: not to hire or retain employees that it knew or should have known have a particular unfitness for the position and that such unfitness creates a risk of injury to others.

An analogous scenario existed in *Cohen*. There too, the media defendant was not being sued for its speech, the media publication, but for its breach of promise. The publication was the result of its underlying breach. That speech was impacted by the breach of promise, however, did not shield the media from application of the general law of promissory estoppel. Similarly, that Evergreen's breach of its duty to exercise reasonable

care in the hiring and supervision of its employee resulted in a defamatory radio broadcast does not shield Evergreen from the application of the general law of negligence. As *Cohen* demonstrates, the Illinois Court's opinion impermissibly places media employees above the law, based upon First Amendment concerns which are unwarranted.

Other federal courts of appeals and state supreme courts, following *Cohen*, have recognized that the media enjoys no special protection from generally applicable laws and that such laws are to be fully enforced against the media without the creation of special circumstances or higher evidentiary or pleading burdens. In *Gonzales v. National Broadcasting Co., Inc.*, 155 F.3d 618 (2d Cir. 1998) the parties to a civil rights action subpoenaed a videotape taken by a reporter at the scene of an allegedly illegal stop and detention. The media defendant claimed that the First Amendment shielded it from production of the videotape since it was taken in the course of its news gathering activities:

> NBC makes two arguments in support of its claim that producing nonconfidential information will interfere with its First Amendment rights. First, NBC argues that having to disclose nonconfidential, unbroadcast information will interfere with the editorial process. Second, NBC contends that without a privilege for nonconfidential information, news organizations will be flooded with non-party subpoenas, responding to which will hamper news gathering activities.

Id. at 624. Thus, NBC's claims are analogous to Evergreen's claim that subjecting the media to the negligent employment torts would unreasonably cause it to guess

at what its radio personalities might say and create a chilling effect on free speech. In rejecting NBC's claims, the court held:

> This assertion, even if accepted as true, is too remote a burden on the First Amendment to justify the creation of a privilege in this case.
>
> * * *
>
> Additionally, to the extent that the lack of a privilege may affect editorial decisions, it seems that this effect may well accrue to the public's benefit. Specifically, to the extent that the threat of subsequent analysis of editorial decisions increases the accountability of editors for their presentation of the news, such scrutiny is likely to make the final news product more complete, accurate and reliable.

Id.

Moreover, the court found that compliance with a subpoena for nonconfidential information put no additional burden on the press that was not applicable to any citizen. Accordingly, the subpoena was fully enforceable against NBC. The court, quoting *United States v. Smith*, 135 F.3d 963, 970 (5th Cir. 1998) found: "Responding to discovery may well take valuable time, decreasing to that extent resources available for news reporting. Yet in the immediate sense, the press here is not differently situated from any other business that may find itself possessing evidence relevant to a criminal trial." *Gonzales*, 155 F.3d at 625. *Accord*, *Herbert v. Lando*, 441 U.S. 153 (1979) (in a defamation case, civil discovery of the a media defendant's editorial process is not afforded special privilege or protection by the First Amendment). The court, therefore, declined to

award the media a shield from subpoenas not available to the general public: "The only question is whether the information is relevant to the Gonzaleses' case and discovery should not otherwise be limited under Fed. R. Civ. P. 26." *Gonzales*, 155 F.3d at 627-28.

The Illinois Court's decision is in direct conflict with *Gonzales* and will serve as a touchstone for the media to argue that it is to be treated differently and is protected from adherence to laws of general application, either in the form of a wholesale immunity or, as in this case, increased standards of pleading and proof before liability may be imparted. This unwarranted departure from *Cohen* requires the intervention of this Court.

Recently, the Supreme Court of California faced an analogous situation in *Shulman v. Group W Productions, Inc.*, 955 P.2d 469 (Cal. 1998). In *Shulman*, the defendants argued that they were not subject to liability for the tort of intrusion, since the act occurred in the course of news gathering and was therefore protected by the First Amendment. Relying upon *Cohen*, the court rejected defendants' claim: "[D]efendants enjoyed no constitutional privilege, merely by virtue of their status as members of the news media, to eavesdrop . . . or otherwise to intrude tortiously on private places, conversations or information." 955 P.2d at 495.

Defendants here similarly should not be shielded from the application of the negligent employment torts. Such laws do not interfere with their employing radio personalities that are controversial; only those who are likely to cause injury to others based upon their prior injury-causing conduct. There is no public interest

served by the heightened pleading and proof protections the Illinois Court has created for media employers, particularly since the negligent employment torts bear only a remote and incidental relationship to speech.

II. THE CONSTITUTIONAL MALICE REQUIREMENT OF *NEW YORK TIMES CO. v. SULLIVAN* PROVIDES AND DEFINES THE BREATHING SPACE FOR THE FIRST AMENDMENT WHEN A NEGLIGENT HIRING INJURY IS BASED UPON A DEFAMATION.

The Illinois Court altered the law of negligent hiring, retention and supervision based upon its view of "first amendment concerns which arise when liability is predicated on speech." (App.1, p.15a.) In so doing, the Illinois Court ignored the constitutional standard for liability predicated upon a defamation or a reputational injury as set forth in *New York Times v. Sullivan*, 376 U.S. 254 (1964). The Illinois Court thus created a new standard of liability that redefined the negligent employment torts as applied to the media. However, *New York Times* holds that, in a public figure defamation case, the media will be liable for its speech only when it acts with constitutional malice. This standard provides the breathing space required by the Constitution to protect First Amendment speech as mandated by the United States Supreme Court; not the *ad hoc* creation of artificial and heightened standards for enforcement of general laws.

Van Horne alleged that Evergreen's negligence proximately resulted in his being defamed. As a public figure, he therefore alleged constitutional malice as an integral component of each of the counts alleging neg-

ligent hiring, supervision and retention and is prepared to meet this burden at trial. (App.5, pp.52a, 55a, 56a, 58a, ¶¶44, 51, 54, 62.) Thus, Van Horne met his pleading requirement as defined by this Court with full regard for any First Amendment concerns indirectly impacted by Evergreen's negligence. Any recovery had for negligent hiring, retention or supervision as triggered by the underlying tort of defamation would therefore meet the constitutional standards with due regard for the "breathing space" for which the Illinois Court evidenced concern.

The Illinois Court has accepted Evergreen's argument that the application of the negligent employment torts to the media will chill free speech because media corporations will not hire controversial figures for fear that they might be sued for not accurately predicting (i.e. guessing) what the broadcaster might say. (App.1, p.16a.) However, Van Horne's causes of action are not premised upon Muller being controversial, but upon Evergreen's hiring and retention of Muller when it knew or should have known that he would engage in injury-causing broadcast conduct and speech that is not protected by the First Amendment. Thus, the harm at issue results not from the "controversial" statement, but from speech that is illegal and which has caused actual injury to others. Moreover, a broadcaster is necessarily responsible for what it chooses to air just as a newspaper is responsible for what it chooses to print. This responsibility and the duty that arise from it are heightened in the case of extemporaneous "shock jocks" who have been given license to "Do whatever you want to do—just entertain, have fun." (App.5, p.57a, ¶58, quoting the President of Evergreen Media Corp.)

Through ignoring the injury-causing broadcast speech and conduct at the heart of Van Horne's negligent hiring counts and Evergreen's notice thereof, the Illinois Court found:

> [R]ecognition of this cause of action where the employee had previously engaged only in "outrageous," but nondefamatory, conduct or speech would run afoul of first amendment principles. The most obvious impact of this rule would be on media employers. Plaintiff's theory would thus hold a media employer liable for its decision to hire or retain a broadcaster simply because that broadcaster was a controversial figure, the reasoning being that such controversial figures are "likely" to engage in defamatory speech.

(App.1, pp.15a-16a.) However, Van Horne's negligent employment causes of action are not predicated upon Muller being controversial or outrageous, but upon his repeated use of his broadcaster's chair to violate civil and criminal laws and cause repeated tangible damage to third persons. These are the facts of which Evergreen had notice, both prior to hiring Muller and after it hired Muller prior to Van Horne's injury.

Contrary to the Illinois Court's analysis, liability for negligent hiring and supervision is not imposed to force an employer to guess what an employee might say; it is imposed to hold the employer responsible when the employer knew or should have known that the employee posed a *foreseeable* risk of harm to third persons. Broadcasters must bear the same responsibility as any other employer and corporate citizen notwithstanding their media status. Moreover, in this case, no guessing

is or was required. Muller's history of injurious and unlawful broadcast speech and conduct were matters of public record when he was hired and continued through this employment.

In *Rice v. Paladin Enterprises, Inc.*, 128 F.3d 233 (4th Cir. 1997), *cert. denied*, ___ U.S. ___, 118 S. Ct. 1515 (1998), the court squarely ruled that speech which incites criminal conduct is not protected. The court, in sustaining the civil action arising from the charged speech stated:

> However, while even speech advocating lawlessness has long enjoyed protections under the First Amendment, it is equally well established that speech which, in its effect, is tantamount to legitimately prescribable nonexpressive conduct may itself be legitimately proscribed, punished, or regulated incidentally to the constitutional enforcement of generally applicable statues. Cf. *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669, 111 S.Ct. 2513, 2518, 115 L.Ed. 2d 586 (1991) (noting "well-established line of decisions holding that generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news"). As no less a First Amendment absolutist than Justice Black wrote for the Supreme Court almost fifty years ago in *Giboney v. Empire Storage & Ice Co.*, in rejecting a First Amendment challenge to an injunction forbidding unionized distributors from picketing to force an illegal business arrangement:
>
> It rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an in-

> tegral part of conduct in violation of a valid criminal statute. We reject the contention now
>
> . . .

Id. at 243.

As alleged in the Second Amended Complaint, Muller's conduct went beyond "controversial speech" and included unlawful and criminal broadcast speech and conduct which repeatedly caused injury to others. Despite these clear warning signs that would put any reasonable employer on notice of Muller's unfitness, Evergreen recruited, hired and retained him. Muller's past conduct served not as a beacon of warning, but as a promise of higher ratings and revenues. Evergreen enjoyed the benefits of Muller's broadcast activities in the form of increased ratings and profits. It must be required to answer for the foreseeable harm and resulting injuries its negligent hiring and supervision proximately caused. This conduct must be shorn of the unconstitutional shield created by the Illinois Court.

The Illinois Court's decision is predicated upon erroneous First Amendment concerns which are unwarranted and inappropriate based upon this Court's decisions in *Cohen* and *New York Times*. The Illinois Court's ruling will elevate media employers to a status above generally applicable laws such as the negligent employment torts. Certiorari is warranted to (i) establish that media employers may not hide behind the First Amendment with respect to their hiring and employment decisions; (ii) protect against inconsistent decisions as to the liability of media employers for generally applicable laws; and (iii) harmonize the Illinois Court's decision with *Cohen v. Cowles Media Co.*, *New York Times*, and their progeny.

CONCLUSION

For the reasons stated herein, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of Illinois.

Respectfully submitted,

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APPENDIX 1

[In The Supreme Court Of Illinois
Dated December 3, 1998]

Docket No. 85063-Agenda 32-September 1998.

KEITH VAN HORNE, Appellee, v.
MATTHEW "MANCOW" MULLER
(Irma Blanco *et al.*, Appellants).

JUSTICE BILANDIC delivered the opinion of the court:

Plaintiff, Keith Van Horne, brought this action in the circuit court of Cook County to recover damages for injury to his reputation resulting from allegedly defamatory statements made by radio deejay Matthew "Mancow" Muller (Muller) and his cobroadcaster Irma Blanco (Blanco). Plaintiff asserted claims for defamation *per se* against Muller and Blanco as well as WRCX Radio (WRCX), the radio station employing Muller and Blanco, and Evergreen Media Corporation (Evergreen), the owner of the radio station. The complaint also asserted claims against WRCX and Evergreen for negligent and reckless hiring, supervision and retention of Muller. The circuit court dismissed the defamation claim against Blanco and the negligent and reckless hiring, supervision and retention claims against WRCX and Evergreen. The appellate court reversed the circuit court's dismissal of those counts. 294 Ill. App. 3d 649. We granted a petition for leave to appeal filed by Blanco, WRCX and Evergreen. 166 Ill. 2d R. 315. We now affirm in part and reverse in part the appellate court's judgment.

BACKGROUND

The statements giving rise to this action were made during the November 11, 1994, broadcast of "Mancow Muller's Morning Madhouse," a radio program aired weekday mornings on WRCX. Defendant Muller was the host of the program and defendant Blanco was Muller's "sidekick" and newscaster. According to Van Horne's complaint, during the broadcast, Muller repeatedly made statements to the effect that Van Horne had threatened and assaulted Muller earlier that morning. The complaint sets forth lengthy and detailed excerpts from the transcript of the broadcast. We will not recount all of the detailed comments contained in the complaint. In sum, on numerous occasions and in colorful detail, Muller stated that Van Horne had been waiting for him at the elevator bank outside the WRCX studio; that Van Horne chased him and threatened his life; and that Van Horne was, among other things, "out of control," "extremely violent," "psychotic," "a danger to society" and "trained in killing people," and "needs to be locked up."

According to the complaint, defendant Blanco engaged in "banter" with Muller about his encounter with Van Horne throughout the broadcast in which she contributed to and supported Muller's accounts of the alleged altercation. Blanco also reported Muller's account of the incident as a news item in her news broadcasts that morning.

The complaint alleged that Muller's statements imputed that Van Horne had engaged in criminal conduct and that the statements were therefore defamatory *per se*. The complaint further alleged that the statements

were false, and that Muller acted with actual malice in making the statements because Muller knew the statements to be false when he made them.

As ultimately amended, the complaint contained eight counts. Count I asserted a claim for defamation *per se* against Muller. Count II asserted a claim for defamation *per se* against Blanco. Count III charged WRCX with defamation *per se* on the ground that WRCX published Muller's and Blanco's false statements by broadcasting them over the public airwaves. Count IV charged Evergreen with defamation *per se* under a theory of vicarious liability for the acts of its agents, WRCX, Muller and Blanco. Counts V and VI asserted claims against WRCX and Evergreen for negligent and reckless hiring of Muller. Count VII and VIII asserted claims that WRCX and Evergreen negligently and recklessly supervised and retained Muller.

The circuit court denied the defendants' motion to dismiss the defamation *per se* counts against Muller, WRCX and Evergreen. The court granted, pursuant to section 2-615 of the Code of Civil Procedure (735 ILCS 2/615 (West 1994)), the defendants' motion to dismiss the defamation *per se* count against Blanco. The circuit court also dismissed the negligent and reckless hiring, supervision and retention counts against WRCX and Evergreen, apparently on the ground that these causes of action require a physical injury. Plaintiff appealed and the appellate court reversed. The appellate court held that plaintiff had adequately pled that Blanco participated in the publication of Muller's defamatory statements. The appellate court further found that dismissal of this count was erroneous because Blanco published statements that were defamatory *per se*. The

appellate court next held that the circuit court erred in dismissing the negligent and reckless hiring, supervision and retention counts. The appellate court concluded that these causes of action do not require an allegation that the plaintiff has sustained a physical injury. 294 Ill. App. 3d 649.

We accepted a petition for leave to appeal filed by Blanco, WRCX and Evergreen (hereinafter defendants). 166 Ill. 2d R. 315. We subsequently allowed a group of broadcasters, publishers, editors and reporters to file an *amicus curiae* brief in support of defendants' position.

Plaintiff filed a motion in this court to strike a portion of defendants' reply brief. That motion was taken with the case. We have reviewed the challenged portion of defendants' reply brief and we find no reason to strike it. Plaintiff's motion is therefore denied.

ANALYSIS

The circuit court granted defendants' motion to dismiss counts II and V through VIII pursuant to section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615 (West 1994)). A motion to dismiss under section 2-615 attacks the legal sufficiency of the complaint. *Bryson v. News America Publications, Inc.*, 174 Ill. 2d 77, 86 (1996). In ruling on such a motion, the court must accept as true all well-pleaded facts and reasonable inferences therefrom. *Bryson*, 174 Ill. 2d at 86. A cause of action should not be dismissed on the pleadings unless it clearly appears that no set of facts can be proved under the pleadings which will entitle the plaintiff to recover. *McGrath v. Fahey*, 126 Ill. 2d 78, 90 (1988).

Defamation Claim Against Blanco

Defendants argue that the appellate court erred in reversing the dismissal of count II of plaintiff's complaint. Count II is directed solely at Blanco and purports to state a cause of action for defamation *per se*. Count II realleges all of the allegations made against Muller in count I. Count II then sets forth in great detail a number of examples of Blanco's "banter" with Muller in which she allegedly "contributed to and supported Muller's accounts of his alleged altercation with Van Horne." For example, the complaint alleges that, after Muller stated that Van Horne would have hurt him had no one else been present during the altercation, Blanco responded, "If it was just the two of you, I really believe that." Blanco also stated, in response to Muller's reiteration of the story, "It happened this morning just as you were getting out of the elevator. It's almost as if he was waiting for you. *** Threatening."

In addition, count II alleges that, during each of her morning news broadcasts, Blanco reported Muller's false account of his encounter with Van Horne as news. The news report by Blanco, as recounted in count II, stated the following:

> "For Mancow's Morning Madhouse, I'm Irma Blanco and here's the latest brought to you by Circuit City. Keith Van Horne's violent side was shining through this morning shortly after 5:00 a.m. in the John Hancock building. Former Bears lineman Van Horne, who is already in a little bit of trouble for allegedly hitting a woman at a gas station, literally ran into Mancow at the elevators in the building, with a near brawl with Van Horne threatening

> Mancow's life, calling him names, and even talking about a lawsuit. The whole thing fizzled out when Mancow graciously offered Van Horne time on the show this morning to air out the differences. Van Horne refused and left the building."

The complaint alleges that Blanco's "'factual' accounts, news reports, and participation in Muller's defamatory statements" falsely accused Van Horne of criminal conduct and were therefore defamatory *per se*. The complaint also alleges that Blanco acted with actual malice.

We agree with the appellate court that the allegations of count II are sufficient to state a cause of action for defamation *per se* against Blanco. A statement is considered defamatory if it tends to cause such harm to the reputation of another that it lowers that person in the eyes of the community or deters third persons from associating with them. *Bryson*, 174 Ill. 2d at 87; *Kolegas v. Heftel Broadcasting Corp.*, 154 Ill. 2d 1, 10 (1992). Certain limited categories of defamatory statements are deemed actionable *per se* because they are so obviously and materially harmful to the plaintiff that injury to the plaintiff's reputation may be presumed. A plaintiff need not plead or prove actual damage to their reputation to recover for a statement that is actionable *per se*. *Bryson*, 174 Ill. 2d at 87. Illinois law recognizes five categories of statements which are considered actionable *per se:* (1) those imputing the commission of a criminal offense; (2) those imputing infection with a loathsome communicable disease; (3) those imputing an inability to perform or want of integrity in the discharge of duties of office or employment; (4) those that prejudice a party, or impute lack of ability, in his or her

trade, profession or business; and (5) those imputing adultery or fornication. *Bryson*, 174 Ill. 2d at 88-89.

In this case, plaintiff has alleged that the statements made by Muller and Blanco were defamatory *per se* because they impute that plaintiff committed criminal conduct. As noted, plaintiff's claims for defamation *per se* against Muller, WRCX, and Evergreen, based on Muller's statements, were sustained by the circuit court. Plaintiff argues that the appellate court correctly held that his claim against Blanco should also be sustained because she contributed to and participated in the publication of the defamatory statements about plaintiff. We agree.

In general, "[a]ll persons who cause or participate in the publication of libelous or slanderous matters are responsible for such publication." 33A Ill. L. & Prac. *Slander and Libel* §83, at 89 (1970). Count II sets forth sufficient facts to support a cause of action against Blanco for her participation in the publication of the allegedly false statements about plaintiff. Plaintiff has pled facts which demonstrate that Blanco was an active participant in the publication of Muller's allegedly false account of his encounter with plaintiff. The trial court has already ruled that Muller's statements about plaintiff will support an action for defamation *per se*. Blanco made several statements affirming Muller's version of the encounter, agreeing with his description of plaintiff's conduct, and even going so far as to confirm that it was not a prearranged "stunt." In addition, in her newscasts, Blanco repeatedly reiterated Muller's statements about his encounter with plaintiff. A statement need not state the commission of a crime with the particularity of an indictment to qualify as defamatory *per*

se. *Kirchner v. Greene*, 294 Ill. App. 3d 672, 680 (1998). The crime of assault is committed when a person engages in unlawful conduct which places another in reasonable apprehension of receiving a battery. 720 ILCS 5/12-1(a) (West 1994). According to the allegations of the complaint, Muller and Blanco both participated in the publication of an allegedly false story which imputed that plaintiff committed an assault on Muller. We therefore hold that the circuit court erred in dismissing count II for failure to state a cause of action.

Negligent and Reckless Hiring, Supervision and Retention

Defendants next assert that the appellate court erred in reversing the dismissal of counts V through VIII of plaintiff's complaint. Counts V through VIII purport to allege claims for negligent and reckless hiring and negligent and reckless supervision and retention against WRCX and Evergreen.

Counts V and VI reallege plaintiff's defamation allegations and claim that WRCX and Evergreen had a duty to exercise reasonable care in the hiring of disc jockeys "who will not recklessly or intentionally cause harm to Van Horne and other third parties via the public airwaves." These counts further allege that, before WRCX and Evergreen hired Muller, Muller had engaged in a course of conduct during his radio broadcasts which constituted "outrageous, irresponsible, reckless, and malicious behavior," and that his behavior "received widespread media attention and proximately resulted in harm to third persons." Counts V and VI list the following examples of Muller's prior conduct:

obstructing traffic for several hours on a San Francisco bridge so that his sidekick could get a haircut in a van stopped on the bridge; broadcasting that the Golden Gate Bridge toll had risen from $3 to $5 causing many listeners to overpay their tolls; hanging a "Welcome to Chicago" banner over the receiving gates during the Christmas rush at San Francisco International Airport and watching travelers panic as they exited the airplane; dropping cinder blocks off a California overpass and causing damage to cars parked below; harassing a host of a local television program by calling her "fat" and "unprofessional" over the public airwaves; causing listeners to storm the San Francisco State University library by announcing that $500 was hidden in a book; and designating "Alzheimer's Awareness Day" and visiting a geriatric center to mock aged individuals over the public airwaves.

Counts V and VI allege that WRCX and Evergreen knew or should have known of Muller's prior conduct when they hired him. Count V alleges that WRCX and Evergreen were negligent in hiring Muller with this knowledge and that their negligence permitted Muller to defame Van Horne over the public airwaves. Count V seeks compensatory damages for the harm caused to plaintiff by Muller. Count VI alleges that WRCX and Evergreen acted in reckless disregard of Muller's history in hiring him and seeks punitive damages in excess of $5 million.

Counts VII and VIII are premised on WRCX's and Evergreen's supervision and retention of Muller. Both counts reallege plaintiff's defamation allegations and claim that the defendants had a duty to supervise their disc jockeys and to refrain from retaining a disc jockey

who, by continued employment, would recklessly or intentionally cause harm to plaintiff or other third persons via the public airwaves. Counts VII and VIII allege that, since WRCX and Evergreen hired Muller, he has continued to engage in "outrageous, irresponsible, reckless, malicious and illegal conduct in the course of his radio broadcasts which has harmed third persons." Counts VII and VIII list the following examples of Muller's conduct: declaring "Roadkill Tuesday" and offering money to listeners who left dead animals at a mall, which resulted in listeners depositing rotting animal carcasses at the mail; offering female listeners money to ride the public transit system topless; and directing his sidekick, "Turd," to stand on the North Avenue bridge over Lake Shore Drive with a sign that read "Honk and we'll drop a cinder block." Count VII charges defendants with negligence in their failure to supervise Muller and in their continued employment of Muller, and seeks compensatory damages. Count VIII characterizes defendants' actions as reckless and seeks punitive damages.

Illinois law recognizes a cause of action against an employer for negligently hiring, or retaining in its employment, an employee it knew, or should have known, was unfit for the job so as to create a danger of harm to third persons. See *Johnson v. Mars,* 279 Ill. App. 3d 372, 376 (1996), *Carter v. Skokie Valley Detective Agency, Ltd.,* 256 Ill. App. 3d 77, 80 (1993); *Bates v. Doria, 150* Ill. App. 3d 1025, 1030 (1986). An action for negligent hiring or retention of an employee requires the plaintiff to plead and prove (1) that the employer knew or should have known that the employee had a particular unfitness for the position so as to create a

danger of harm to third persons; (2) that such particular unfitness was known or should have been known at the time of the employee's hiring or retention; and (3) that this particular unfitness proximately caused the plaintiff's injury. *Mueller v. Community Consolidated School District 54*, 287 Ill. App. 3d 337, 341-42 (1997); *Fallon v. Indian Trail School, Addison Township School District No. 4*, 148 Ill. App. 3d 931, 935 (1986). An employer's direct liability for negligent hiring and retention is distinct from its *respondeat superior* liability for the acts of its employees. *Bates*, 150 Ill. App. 3d at 1031. Under a theory of negligent hiring or retention, the proximate cause of the plaintiff's injury is the employer's negligence in hiring or retaining the employee, rather than the employee's wrongful act. *Young v. Lemons*, 266 Ill. App. 3d 49, 52 (1994); *Carter*, 256 Ill. App. 3d at 80.

Defendants contend that the type of injury claimed in this case, injury to plaintiff's reputation by means of allegedly defamatory statements, is not the type of injury that will support a cause of action for negligent hiring or retention. As defendants point out, the Illinois cases recognizing these causes of action have generally involved some form of physical injury to the plaintiff or his property. For example, in *Easley v. Apollo Detective Agency, Inc.*, 69 Ill. App. 3d 920 (1979), the defendant security agency hired a security guard to guard the plaintiff's building who used his employer-provided passkey to enter the plaintiff's apartment and assault her. Similarly, in *Malorney v. B&L Motor Freight, Inc.*, 146 Ill. App. 3d 265 (1986), the plaintiff was raped and beaten by a truck driver whose prehiring record showed that he had a history of violent sex crimes, including

raping two teenagers while driving a truck for another company. Likewise, in *Mueller v Community Consolidated School District 54*, 287 Ill. App. 3d 337 (1997), the plaintiff, a junior high school student, was sexually assaulted by a wrestling coach whom the defendant school district had employed even though he had a criminal background exhibiting "moral turpitude." See also *Carter v. Skokie Valley Detective Agency, Ltd.*, 256 Ill. App. 3d 77, 79 (1993) (employee murdered, raped and kidnapped plaintiff's decedent); *Bryant v. Livigni*, 250 Ill. App. 3d 303, 305 (1993) (employee physically attacked child); *Gregor v. Kleiser*, 111 Ill. App. 3d 333, 338-39 (1982) (employee physically attacked plaintiff). Based on this case law, defendants assert that a plaintiff may maintain an action for negligent hiring or retention only where the plaintiff has suffered a physical injury.

Defendants further assert that recognition of a cause of action for negligent hiring or retention of an employee based on the employee's defamatory statements would violate first amendment principles. Defendants argue that holding employers liable for hiring or retaining employees who may make defamatory statements in the future would require employers to determine, essentially, whether an employee is "fit to speak." Employers would therefore be reluctant to hire any person who has engaged in controversial speech or conduct in the past, leading to a chilling effect on free speech.

We need not decide in this case whether recognition of a cause of action for negligent hiring or retention of an employee premised on the employee's defamatory statements would be consistent with first amendment

principles or past Illinois precedent. Even if such a cause of action were cognizable, plaintiff's allegations in this case are not sufficient to state such a cause of action. We find that plaintiff's allegations are insufficient, as a matter of law, to impose liability on WRCX and Evergreen under a theory of negligent hiring or retention of Muller. In the context of this case, plaintiff's allegations fail to establish a sufficient nexus between the particular alleged unfitness of Muller and the injury suffered by plaintiff.

To successfully plead a cause of action for negligent hiring or retention, it is not enough for the plaintiff to simply allege that the employee was generally unfit for employment. "There are many kinds of unfitness for employment that do not give rise to tort liability for negligent hiring [or retention]." *Fallon v. Indian Trail School, Addison Township School District No. 4,* 148 Ill. App. 3d 931, 935 (1986). Rather, liability arises in this context when a *particular* unfitness of an employee gives rise to a particular danger of harm to third parties. See *Giraldi v. Community Consolidated School District No. 62,* 279 Ill. App. 3d 679, 692 (1996); *Fallon,* 148 Ill. App. 3d at 935. The particular unfitness of the employee must have rendered the plaintiff's injury foreseeable to a person of ordinary prudence in the employer's position. *Escobar v. Madsen Construction Co.,* 226 Ill. App. 3d 92, 94 (1992).

In this case, plaintiff alleges that he was injured by Muller's false, defamatory statements. Plaintiff was therefore required to plead facts showing that "WRCX and Evergreen knew or should have known that Muller was likely to make false, defamatory statements during his radio show if he was hired. Plaintiff's complaint

lists a number of incidents of prehiring and posthiring conduct by Muller and, from these incidents, draws the conclusion that defendants knew or should have known that Muller would make false, defamatory statements on the air. None of the examples of Muller's prior conduct listed by plaintiff, however, involved his making false, defamatory statements. The mere fact that Muller had previously engaged in offensive or outrageous conduct during his radio programs does not establish that he had a propensity to make false, defamatory statements. The only thing defendants could have known about Muller from these prior incidents was that he had engaged in outrageous and offensive conduct. We hold that this conduct was not sufficient to put defendants on notice that Muller would make false, defamatory statements on the air if WRCX and Evergreen hired him.

The appellate court in *Giraldi v. Community Consolidated School District No. 62*, 279 Ill. App. 3d 679, 692 (1996), reached a similar conclusion. Therein, the plaintiff sued a school district for negligent hiring based on its employment of a school bus driver who sexually abused a student. The driver's prior work history showed only that he had a tendency to run late. The appellate court upheld the trial court's refusal to submit the negligent-hiring claim to the jury because there was "no evidence that [the employer] knew or should have known that the hiring of [the driver] would create a danger of harm to third persons." *Giraldi*, 279 Ill. App. 3d at 692. The only knowledge the employer could have drawn from the driver's history was that he had a tendency to be late. The court noted that there was no "factual or logical relationship" between that knowl-

edge and the driver's assault of the student. Thus, even if the school district was negligent in hiring a bus driver who often ran late, *that* negligence did not proximately cause the plaintiff's injury. *Giraldi*, 279 Ill. App. 3d at 692. Similarly, in *Fallon v. Indian Trail School, Addison Township School District No. 4*, 148 Ill. App. 3d 931, 935 (1986), a student was injured on a trampoline during physical education class. The plaintiff sued the school for negligently hiring two physical education teachers. The plaintiff did not allege specific characteristics of the teachers which made them unfit for their positions, but alleged simply that they were 11 not qualified" for their positions. The appellate court upheld the dismissal of the negligent-hiring claim, finding that this general allegation of unfitness did not suffice to establish that the teachers had a "particular unfitness" which created a particular danger of harm to third persons. *Fallon*, 148 Ill. App. 3d at 935-36.

Plaintiff urges us to hold that Muller's prior "outrageous and irresponsible" conduct was sufficient to put defendants on notice that he would defame people on his radio show. We decline to do so. The type of prior conduct by an employee which will be sufficient to put an employer on notice that the employee is unfit for a particular position will differ in every case. In this case, we employ a narrow interpretation of this requirement because of the first amendment concerns which arise when liability is predicated on speech. Although we do not decide in this case whether first amendment concerns would preclude all attempts to state a cause of action for negligent hiring or retention premised on an employee's defamatory statements, we do find that recognition of this cause of action where the employee had

previously engaged only in "outrageous," but nondefamatory, conduct or speech would run afoul of first amendment principles. The most obvious impact of this rule would be on media employers. Plaintiff's theory would thus hold a media employer liable for its decision to hire or retain a broadcaster simply because that broadcaster was a controversial figure, the reasoning being that such controversial figures are "likely" to engage in defamatory speech. Such a holding would have an inevitable chilling effect on free speech, as media employers would be reluctant to hire controversial broadcasters or reporters. The law of defamation must not only protect the individual's interest in vindicating his good name and reputation, but also allow the first amendment guarantees the "'breathing space' essential to their fruitful exercise." *Chapski v. Copley Press,* 92 Ill. 2d 344, 351-52 (1982), citing *New York Times Co. v. Sullivan,* 376 U.S. 254, 11 L. Ed. 2d 686, 84 S. Ct. 710 (1964). Imposing liability for negligent hiring or retention under these circumstances would not grant the first amendment guarantees sufficient "breathing space." Whether we would ever recognize a cause of action for negligent hiring or retention based on an employee's defamatory statements is not decided in this case. We hold only that this cause of action may not be premised solely on allegations that an employer hired an employee who had previously engaged in controversial, but nondefamatory, speech or conduct.

Accordingly, we hold that plaintiff's allegations in this case are insufficient to state a cause of action against WRCX or Evergreen for negligent hiring or retention of Muller. The circuit court therefore properly dismissed counts V through VIII of plaintiff's complaint.

CONCLUSION

For the foregoing reasons, we affirm the appellate court holding reversing the dismissal of count 11 of plaintiff's complaint. We reverse the appellate court holding reversing the dismissal of counts V, VI, VII, and VIII of plaintiff's complaint. The circuit court's dismissal of counts V, VI, VII, and VIII is affirmed. This cause is remanded to the circuit court for further Proceedings consistent with this opinion.

Appellate court judgment affirmed in part
and reversed in part;
circuit court judgment affirmed
in part and reversed in part;
cause remanded.

APPENDIX 2

In The Appellate Court Of Illinois
First District, Sixth Division
No. 1-96-0331—Dated January 30, 1998

KEITH VAN HORNE,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County
	)	
v.	)	
	)	Honorable
	)	Michael J. Hogan,
MATTHEW "MANCOW" MULLER,	)	Judge Presiding.
an individual, IRMA BLANCO, an	)	
individual, EVERGREEN MEDIA	)	
CORPORATION, a Delaware	)	
corporation, and WRCX RADIO,	)	
	)	
Defendants-Appellees.	)	

JUSTICE QUINN delivered the opinion of the court:

This case involves an appeal from the circuit court of Cook County in which Keith Van Horne ("Van Horne") alleges that Chicago disc jockey Matthew "Mancow" Muller ("Muller") and his on-air associate, Irma Blanco ("Blanco"), published defamatory remarks about him during their morning broadcast. We also address the scope of liability for an action alleging negligent and/or reckless hiring, supervision, or retention where the plaintiff has suffered no physical harm. Plaintiff appeals from the trial court's order dismissing five counts of the complaint under section 2-615 of the Illinois Code of Civil Procedure (735 ILCS 5/2-615 (West 1994)). Jurisdiction is vested in this court pursuant to Supreme Court Rule 304(a) (155 Ill. 2d R. 304(a)).

For the following reasons, we reverse.

The facts pertaining to this appeal are as follows. On November 11, 1994, at approximately 5:00 a.m. Muller encountered Van Horne at the radio station where Muller worked. At that time, Muller and Van Horne exchanged words, and Van Horne allegedly chased Muller down a hallway and threatened to kill him. Muller reported the incident numerous times during his morning talk show. Blanco discussed the incident with Muller on-air and included a summary of the incident in her news reports during the broadcast. Van Horne alleges that Muller and Blanco made various defamatory remarks about him during the course of the radio program.

On November 28, 1994, Van Horne filed a verified complaint against Muller, Blanco, and their employers, Evergreen Media Corporation ("Evergreen") and WRCX Radio ("WRCX"), alleging that the statements made by Muller and Blanco during the broadcast were defamatory *per se*. Defendants responded by filing a motion to dismiss pursuant to section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615 (West 1994) On March 30, 1995, the trial court dismissed the count against Blanco, and let stand the counts against Muller, Evergreen, and WRCX. The dismissal of the count against Blanco was without prejudice. On April 27, 1995, Van Horne filed an amended verified complaint which revised the defamation claim against Blanco ("Count II"). The complaint also added four counts against WRCX and Evergreen for negligent and/or reckless hiring and for negligent and/or reckless retention and supervision ("Counts V - VIII") Defendants subsequently moved to

dismiss both the defamation count against Blanco and the four new counts against WRCX and Evergreen.

On September 11, 1995, the trial court dismissed the negligent and/or reckless hiring counts, and the negligent and/or reckless retention and supervision counts with prejudice on the grounds that Van Horne could not allege that he suffered physical injury as a result of the alleged defamatory statements. On December 27, 1995, the trial court dismissed the defamation count against Blanco with prejudice.

On appeal, plaintiff contends that: (1) the trial court erred in dismissing the defamation count against Blanco where Blanco participated in and contributed to the statements found to be defamatory *per se*; (2) the trial court erred in dismissing the defamation count against Blanco where Blanco republished the statements found to be defamatory *per se*; and (3) the trial court erred in dismissing the negligent and/or reckless hiring and the negligent and/or reckless supervision and retention counts against WRCX and Evergreen.

A trial court may grant a motion to dismiss a complaint pursuant to section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615 (West 1994)) when the complaint does not contain allegations of fact sufficient to state a cause of action. *Singer v. Brookman*, 217 Ill. App. 3d 870, 878, 578 N.E.2d 1 (1991). Upon ruling on a motion to dismiss, courts must take all well-pleaded facts as true, and construe all reasonable inferences in the light most favorable to the plaintiff. *Roderick Development Investment Company, Inc. v. Community Bank of Edgewater*, 282 Ill. App. 3d 1052, 1057, 668 N.E.2d 1129 (1996). Pleadings in the complaint must be viewed

liberally with a view toward doing substantial justice between the parties. *Disc Jockey Referral Network, Ltd. v. Ameritech Publishing*, 230 Ill. App. 3d 908, 912, 596 N.E.2d 4 (1992). The issue before the court when reviewing a motion to dismiss is one of law, and the standard of review therefore is de novo. *Roderick*, 282 Ill. App. 3d at 1057.

Van Horne first alleges that the trial court erred in dismissing the defamation count against Blanco where Blanco participated in and contributed to statements found to be defamatory *per se*. The statements in question here formed the basis of the count against Muller for defamation *per se*, and that count of the complaint survived a motion to dismiss pursuant to section 5/2-615 of the Code of Civil Procedure. 735 ILCS 5/2-615 (West 1994). Hence, we address Blanco's liability for participating in and contributing to statements found to be defamatory *per se*.

This issue involves the scope of liability for actions alleging defamation. Generally,

> "[a]ll persons who cause or participate in the publication of libelous or slanderous matter are personally responsible for such publication, each being liable in full without apportionment as to his particular share. Hence, one who requests, procures, or aids or abets, another to publish defamatory matter is liable as well as the publisher." 53 C.J.S. Libel and Slander, Section 115 (1987).

Thus, a defendant may be held liable for participating in or contributing to the publication of a defamatory statement. Contrary to defendants' position, this principle of law holds true regardless of whether a plaintiff alleges defamation *per se* or defamation *per quod*. See

Kumaran v. Brotman, 247 Ill. App. 3d 216, 617 N.E.2d 191 (1993) (plaintiff allowed to amend complaint to allege defamation *per se* against a newspaper reporter, the newspaper, and two individuals quoted in alleged defamatory article).

Here, it is clear from the record that there are sufficient allegations of fact to support a cause of action against Blanco for her participation in the publication of the statements found to be defamatory *per se*. In Count II, Van Horne alleges that Blanco was more than an innocent bystander when Muller published the remarks found to be defamatory *per se*. The count sets forth how Blanco joined Muller in his description of the encounter with Van Horne, how Blanco agreed with Muller's version of the events, and how Blanco confirmed that the encounter was not a pre-arranged stunt. Blanco was not a disinterested or detached witness to Muller's defamatory remarks, rather she was an active participant.

Defendants argue that a cause of action against Blanco for defamation *per se* cannot stand because Blanco's statements, on their own, were not defamatory. Defendants overlook the fact that defamatory statements must be considered in the context in which they were made. See *Flip Side, Inc. v. Chicago Tribune Co.*, 206 Ill. App. 3d 641, 651, 564 N.E.2d 1244 (1990). As such, we find that there are allegations of fact sufficient to state a cause of action, and the trial court therefore erred in dismissing count II of the complaint alleging defamation based upon Blanco's participation in the broadcast.

Van Horne next alleges that the trial court erred in dismissing the defamation count against Blanco where

Blanco republished the statements found to be defamatory *per se*.

Initially, we note that this issue is separate and distinct from the first issue on appeal. The first issue involves the sufficiency of a complaint alleging liability based on Blanco's participation in the broadcast. This issue involves the sufficiency of a complaint alleging liability based on Blanco's own words. Further, we note that Blanco did not republish verbatim the statements made by Muller which the trial court found to be defamatory *per se*. Rather, Blanco summarized the encounter between Van Horne and Muller. Yet, the form of the republication in the present case is largely irrelevant due to our finding that Blanco published statements which were defamatory *per se*.

A statement is considered defamatory if it tends to cause harm to the reputation of another by lowering that person in the eyes of the community or deterring third persons from associating with the person. Restatement (Second) of Torts §559 (1977). A defamatory statement may be classified as either defamatory *per se* or defamatory *per quod*. In actions alleging defamation *per quod*, the plaintiff must allege extrinsic facts to prove the defamatory nature of the statement, whereas in actions alleging defamation per *se*, the defamatory character of the statement is apparent on its face. *Kolegas v. Heftel Broadcasting Corp.*, 154 Ill. 2d 1, 607 N.E.2d 201 (1992).

In Illinois, there are five classes of defamatory statements which give rise to a cause of action for defamation *per se*: (1) those imputing the commission of a criminal offense; (2) those imputing infection with a

communicable disease which, if true, would tend to exclude one from society; (3) those imputing inability to perform or want of integrity in the discharge of duties of office or employment; (4) those prejudicing a particular party in his or her profession or trade; and (5) those stating false accusations of fornication or adultery. *Bryson v. New America Publications*, 174 Ill. 2d 77, 88-89, 672 N.E.2d 1207 (1996); *Fried v. Jacobson*, 99 Ill. 2d 24, 27, 457 N.E.2d 392 (1983). Further, a defendant may be held liable for republishing a defamatory statement published by another. *Owens v. CBS*, 173 Ill. App. 3d 977, 527 N.E.2d 1296 (1988).

In the present case, we find that the trial court also erred in dismissing Count II because there are sufficient allegations of fact to support a cause of action for defamation *per se* against Blanco. During her first news report of the morning, Blanco made the following statements:

> Keith Van Horne's violent side was shining through this morning shortly after 5:00 a.m. in the John Hancock building. Former Bears lineman Van Horne, who is already in a little bit of trouble for allegedly hitting a woman at a gas station, literally ran into Mancow at the elevators in the building, with a near brawl with Van Horne threatening Mancow's life, calling him names, and even talking about a lawsuit.

Blanco made substantially similar statements during three other news reports that morning. We find that these statements allege that Van Horne committed the offense of assault—unlawful conduct which places another in reasonable apprehension of receiving a battery. 720 ILCS 5/12-1(a) (West 1994). Statements

imputing the commission of an offense are properly classified as defamatory *per se*. *Bryson*, 125 Ill. 2d at 88. Accordingly, the trial court erred in dismissing Count II of the complaint.

This case differs from defendants' citation to *Richardson v. Dunbar*, 95 Ill. App. 3d 254, 419 N.E.2d 1205 (1981). In *Richardson*, the plaintiff alleged that the following statement constituted defamation per se; "he grabbed Danny by the shoulder and tried to turn him around." *Richardson*, 95 Ill. App. 3d at 254. The appellate court disagreed with the plaintiff on the grounds that the statement did not import the commission of a crime. *Richardson*, 95 Ill. App. 3d at 254. Rather, the statement required an explanation of the surrounding circumstances, and therefore could not be classified as defamatory *per se*. Here, Blanco published the above-discussed statements on four different occasions. These statements allege the commission of the crime of assault, and no explanation of surrounding circumstances is necessary to reach that conclusion.

However, even if a statement is found to be defamatory *per se*, it will no longer be considered defamatory if the statement is reasonably capable of an innocent construction. *Quinn v. Jewel Food Stores, Inc.*, 276 Ill. App. 3d 861, 868, 658 N.E.2d 1225 (1995). To determine whether a statement is capable of an innocent construction, a court must consider the statement in context giving the words and implications therefrom their natural and obvious meaning. *Quinn*, 276 Ill. App. 3d at 868. When so construed, a statement will not be considered defamatory *per se* if it, "may reasonably be innocently interpreted." *Chapski v. Copley Press*, 92 Ill. 2d 344, 352, 442 N.E.2d 195 (1982).

Here, given the words and implications therefrom their natural and obvious meaning, we conclude that Blanco's remarks are not capable of innocent construction. Blanco, on four different occasions, reported that Van Horne threatened Muller's life. Given that Blanco made these statements while describing an altercation between Van Horne and Muller, the statements are not reasonably capable of innocent construction. As such, Blanco's statements are properly classified as defamatory *per se*, and the trial court erred in dismissing count II of the complaint.

Van Horne's third argument on appeal is that the trial court erred in dismissing the negligent and/or reckless hiring and the negligent and/or reckless supervision and retention counts against WRCX and Evergreen where Muller allegedly has a history of reckless conduct both in his current employment, and in previous jobs as a disc jockey.

Plaintiff's complaint sets forth seven different instances of alleged reckless conduct on behalf of Muller prior to his employment by WRCX and Evergreen. Specifically, the complaint alleges that while Muller was a disc jockey in California he, among other actions: obstructed access to the San Francisco Bay Bridge for three hours causing a traffic jam involving 35,000 commuters; dropped cinder blocks off a California Bayshore overpass causing damage to cars parked below; harassed the host of a local television program by calling her "fat" and "unprofessional" over the public airwaves; and designated a day as "Alzheimer's Awareness Day" where he visited a geriatric center in San Francisco and asked the residents questions they could not answer. The complaint also sets forth three instances of alleged

reckless conduct which occurred while Muller was employed by WRCX and Evergreen. These instances included, among other actions: declaring a "Roadkill Tuesday" where he prompted listeners to leave dead animals at a shopping mall, and directing an on-air associate to stand on the North Avenue bridge while holding a sign that read "[h]onk and we'll drop a cinder block."

Negligent and/or reckless hiring, supervision, and retention are distinct causes of action. A cause of action for negligent hiring alleges that: (1) an employer knew or should have known that the employee had a particular unfitness for the position so as to create a danger of harm to third persons, (2) the unfitness was known or should have been known at the time of hiring, and (3) the unfitness proximately caused the claimed injury. *Mueller v. Community Consolidated School District 54 et al.*, 287 Ill. App. 3d 337, 341-42, 678 N.E.2d 660 (1997), citing *Fallon v. Indian Trail School, Addison Township School District No. 4*, 148 Ill. App. 3d 931, 935, 500 N.E.2d 101 (1986). Negligent supervision alleges that: (1) an employer had a duty to supervise its employees, (2) the employer negligently supervised an employee, and (3) such negligence proximately caused the plaintiff's injuries. *Mueller*, 287 Ill. App. 3d at 342-43. Negligent retention alleges that: (1) an employer knew or should have known that the employee had a particular unfitness for the position so as to create a danger of harm to third persons, (2) the employer retained the employee in his or her employment even after the employer knew or should have known about the unfitness, and (3) the unfitness proximately caused the claimed injury. *Johnson v. Mers*, 279 Ill. App. 3d

372, 376, 664 N. E. 2d 668 (1996); *Bates v. Doria*, 150 Ill. App. 3d 1025, 1030-31, 502 N.E.2d 454 (1986).

An action for negligent hiring may be brought even where the employee's conduct occurred outside the scope of his or her employment. *Johnson*, 279 Ill. App. 3d at 376. The rationale behind this theory is that in an action alleging negligent hiring, the proximate cause of the plaintiff's injuries is the employer's failure to exercise reasonable care in hiring the employee, rather than the wrongful conduct of the employee. *Young v. Lemons*, 266 Ill. App. 3d 49, 52, 639 N.E.2d 610 (1994).

Illinois courts have not explicitly defined the type of injury necessary to sufficiently allege a cause of action under these forms of employer liability. However, precedent establishes that some form of physical injury has been alleged in each of the cases where the complaint withstood a challenge to its legal sufficiency. See generally, *Malroney v. B & L Motor Freight, Inc.*, 146 Ill. App. 3d 265, 496 N.E.2d 1086 (1986) (employee raped and assaulted victim); *Gregor v. Kleiser*, 111 Ill. App. 3d 333, 443 N.E.2d 1162 (1982) (employee physically attacked and assaulted victim); *Easley v. Apollo Detective Agency, Inc.*, 69 Ill. App. 3d 920, 387 N.E.2d 1241 (1979) (employee sexually assaulted victim), *cf. Huber v. Seaton*, 165 Ill. App. 3d 445, 519 N.E.2d 73 (1988), *rev'd on other grounds*, 186 Ill. App. 3d 503, 542 N.E.2d 464 (1989).

However, just because physical injury has been alleged in previous cases does not mean that such an allegation is a prerequisite to stating a cause of action under these forms of employer liability. The Restatement (Second) of Agency describes the basis for these causes of action as follows:

> "A person conducting an activity through servants or other agents is subject to liability for harm resulting from his conduct if he is negligent or reckless:
>
> ***
>
> (b) in the employment of improper persons or instrumentalities in work involving risk of harm to others:
>
> (c) in the supervision of the activity; or
>
> (d) in permitting, or failing to prevent, negligent or other tortious conduct by persons, whether or not his servants or agents, upon premises or with instrumentalities under his control." Restatement (Second) of Agency §213 (1957).

A plain reading of this section reveals no requirement that a plaintiff allege physical injury, and we hold that complaints stating a cause of action for negligent or reckless hiring, supervision and retention need not allege physical injury. As such, we find that the trial court erred in dismissing counts V - VIII.

Defendants express concern that this holding will result in a "chilling effect" on free speech as media companies will be discouraged from hiring controversial broadcasters. We disagree. The issue before us is whether a complaint alleging negligent and/or reckless hiring, supervision, and retention can withstand a legal challenge under section 2-615 of the Illinois Code of Civil Procedure where the complaint does not allege physical injury. As noted above, we find that there is no requirement that physical injury be alleged. Without expressing an opinion about defendants' ultimate liability in the present case, we note that the intent of this holding is not to discourage companies from hiring

controversial broadcasters, rather, the intent is to protect innocent persons from defamatory remarks.

Defendants also express concern over the burden placed on the communications industry by our holding. Specifically, defendants argue that this holding could impose liability on employers for not accurately predicting what a broadcaster might say on the air. We do not consider a review of a prospective employee's past to determine his or her fitness for a job as a broadcaster to be unduly burdensome.

For the above-stated reasons, we reverse the judgment of the circuit court of Cook County and remand for further proceedings not inconsistent with the views contained herein.

Reversed and remanded.

THEIS, J., and ZWICK, J. concur.

APPENDIX 3

(Letterhead of)

SUPREME COURT OF ILLINOIS
SUPREME COURT BUILDING
SPRINGFIELD 62701

February 1, 1999

Mr. Phillip J. Zisook
Deutsch, Levy & Engel, Ltd.
225 W. Washington St., S#1700
Chicago, IL 60606

No. 85063 – Keith Van Horne, appellee, v. Matthew "Mancow" Muller, etc., et al. (Irma Blanco, etc., et al., appellants). Appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for rehearing in the above entitled cause.

The mandate of this Court will issue to the appropriate Appellate Court and/or Circuit Court or other agency on February 16, 1999.

APPENDIX 4

[Dated September 11, 1995]

IN THE CIRCUIT COURT
OF COOK COUNTY, ILLINOIS

Keith Van Horne,	)	
	)	
Plaintiff,	)	
v.	)	No. 94 L 15006
	)	
	)	
Matthew "Mancow" Muller,	)	
	)	
Defendant.	)	

ORDER

This cause, coming on for hearing on defendants' 2-615 motion to dismiss Counts II and V-VIII of the second amended complaint, all counsel being present and the court being duly advised in the premises;

IT IS HEREBY ORDERED: Defendants' motion is granted with respect to Counts V-VIII and that Counts V-VIII of the second amended complaint are dismissed with prejudice;

That the court has taken under advisement defendants' motion with respect to Count II and will rule on that Count on September 20, 1995 at 2:00 p.m.

Dated: ENTER:

Sep 11, 1995 /s/ Michael J. Hogan
Judge

APPENDIX 5

[Filed July 7, 1995]

IN THE CIRCUIT COURT
OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

KEITH VAN HORNE,	)	
	)	
Plaintiff,	)	
v.	)	
	)	No. 94 L 15006
	)	
MATTHEW "MANCOW" MULLER, an individual; IRMA BLANCO, an individual; EVERGREEN MEDIA CORPORATION, a Delaware Corporation; and WRCX RADIO,	)	
	)	
Defendants.	)	

VERIFIED SECOND AMENDED COMPLAINT

Plaintiff Keith Van Horne, by his attorneys, McConnell & Mendelson and Deutsch Levy & Engel, Chartered, complains of defendants as follows:

Parties

1. Plaintiff Keith Van Horne ("Van Horne") is a resident of Riverwoods, Illinois. Van Horne is a former professional athlete and Chicago Bear and former radio talk show host in the Chicago metropolitan area.

2. Defendant Matthew "Mancow" Muller ("Muller") is a disc jockey and host of Mancow Muller's Morning Madhouse, a radio program aired weekday mornings on WRCX, Rock 103.5 FM, in Chicago.

3. Defendant Irma Blanco ("Blanco") is Muller's sidekick and the newscaster for WRCX during Mancow Muller's Morning Madhouse. Blanco participates in Muller's show during newscasts and throughout non-news portions of his morning program.

4. Defendant WRCX is a radio station broadcast throughout the Chicago metropolitan area from the John Hancock Building in Chicago, Illinois. On information and belief, WRCX's radio signal is received in portions of Indiana and Wisconsin in addition to Illinois. WRCX broadcasts Muller's radio program on weekday mornings between 5:30 a.m. and 10:00 a.m. On information and belief, WRCX is Muller's and Blanco's employer.

5. Defendant Evergreen Media Corporation ("Evergreen") owns and operates WRCX, and broadcasts WRCX through the public airwaves. Evergreen is a Delaware corporation.

Count I
Defamation Per Se
(Against Muller)

6. Beginning at 5:30 a.m. on Friday, November 11, 1994, Muller claimed repeatedly throughout his four and one-half hour broadcast ("the broadcast") that, among other things, Van Horne had waited at the elevator bank outside the WRCX studio for Muller to arrive at work, and shortly after 5:00 a.m. tried to "victimize" and "brutalize" Muller, and threatened to kill him.

7. In the course of the broadcast, at or about 7:28 a.m., Muller played a recording which purported to tell

the story of the alleged attack on Muller by Van Horne earlier that morning. The recording included the following statements:

> Guess who attacked Mancow today?
> Keith Van Horne, yeah, he should be put away.
> Slapped a bitch the other day.
> Man, that big hairy ass is crazy.
>
> We were going up and he was going down,
> Threatened to kick the Cow all over town.
> Cops are going to take him downtown,
> for slappin' all the bitches crazy.
>
> Van Horne is going down.
> Van Horne is going down .....

8. Immediately after this recording was aired, and in the course of the broadcast, Muller said of Van Horne:

> "He is Charles Manson who works out. That's kind of the comparison I want to make. Okay?"

9. Muller made repeated defamatory statements about Van Horne during the entire November 11, 1994 show, alleging that Van Horne stalked, chased, assaulted, intimidated, and threatened to kill Muller, and that Van Horne is dangerous and likely to kill Muller and other individuals. Muller stated of Van Horne:

> "He threatened me."
>
> "Then he chased me down the hall."
>
> "Here is an individual who is extremely violent, extremely out of control in his dealings with me this morning, threatening me at where I work."
>
> "He chased me down the hall, he threatened me. I didn't run away, but I was walking away. I was coming to work. Uh, he threatened me, and I said

let's talk about this. 'We're not gonna talk, we're gonna (inaudible).'"

"This guy is—is a trained professional. He, you know, he is trained in killing people. Well, he's trained at killing his brain cells, obviously he's been working at it. But he's—he's trained at, you know, inflicting pain."

"Let me tell you something. Strong-arm tactics, you cannot—you know, listen, we cannot be bullied. I'm not gonna be bullied, this program is not gonna be bullied. And, -uh, we're not gonna change anything we do. We do the program, I—I wouldn't put things on the air unless I, you know, sometimes we screw up, but I—I do things on the air and I stand beside them. And just because some, uh, large meathead threatens me, I'm not gonna change the show. If he wants to beat me up, fine, he'll go to jail."

"The man is an extremely violent, troublesome individual, and I feel personally that he should be put in jail immediately. Uh, he is out of control. He is gonna hurt somebody. It may not be me, but he is a danger to society, and I'm telling you, we hear the stories, allegedly he, uh, he, uh, manhandled and brutalized a woman over a traffic altercation. This man should be put behind bars. He is dangerous. And I saw it personally in the hall this morning, he chased me down, he yelled at me, he was out of control. He is a violent—a violent, violent force."

"The individual I dealt with in the hall today that was threatening my life. . ."

"He needs to be locked up. I think he is a danger against society."

"This man is gigantic. And I can't—I can't come to work and have somebody waiting for me outside the elevator, threatening my life."

"I'm a little bit down after, you know, my life being threatened."

"I had to deal today at 5:00 with one of the most violent individuals I've ever encountered. He is a violent, out of control individual, and I am pleading with the authorities to put this man in jail. He is a danger to society. He threatened me physically."

"He is a desperate man who has—who has tied a knot at the end of his rope, but the rope is fraying. This man is ready to explode. And I'm gonna get a restraining order, and I don't know how he's gonna be able to work in the same building with me, because the restraining order will keep him away from me. I'm gonna go today."

"He—he is an out-of-control individual, he is a frightening individual."

"I got to draw up something today, a restraining order. This man is out of control."

"When a Bear is accused of beating up a woman, I'm allowed to talk about it. The day I did it, he came over and threatened me. Told people 'Tell Mancow I'm going to kill him.' He threatened me."

"His body is a weapon. This is a trained man who hurts other people. He is trained in pain, that's all he does. . . This is not like a quarter-back or a half-back or somebody like that. This is just a—a piece of meat. This is a large, dumb individual coming at me. His body is a weapon."

"This is a man that needs to be locked up. He waited for me. He waited for me in the office here to attack me."

"If you want to comment, or if you're a lawyer, cause I want to draw up some papers, I want to get a restraining order against this—this maniac today after the program."

10. Several times during the broadcast, Muller informed WRCX listener his story about his alleged confrontation with Van Horne was truthful. At approximately 6:38 a.m., Muller stated:

> "It is not a joke. I was threatened physically today."

11. Approximately one hour later, Muller informed his listeners:

> "Now, you know, this is my show and people are going to think aw, this is some kind of radio stunt, some kind of fixed fight like other people—other radio people, have done in this market. I don't—this is not fixed."

12. Later in the broadcast, Muller again emphasized the seriousness his account of the alleged incident:

> "Believe me, I'm scared. And I think he is dangerous, and if you would have seen him this morning, you'd be frightened. No, I'm definitely frightened and I do take it seriously. Believe me. It was a scary incident. It's one of the scariest things that's happened to me in a long, long time."

13. Throughout the November 11, 1994 broadcast, Muller continued to defame Van Horne, alleging that Van Horne stalked, chased, threatened to kill, intimidated, and assaulted Muller. Muller stated:

> "What do you do in this case when I've got somebody waiting for me in the front door of my office this morning, physically saying he's gonna kill me?"
>
> "You know, he said, 'you keep talking about me I'm gonna hurt you.' He's threatened me every day, he's told other people here that I work with, you know, 'tell Mancow I'm gonna kill him.'"

"This man really does not know how to deal with things like a human being."

"He's telling people he's gonna kill me."

"He's telling people he was gonna kill me, I wanted to talk it out. But what I will not bow down to, and I've gotten this from the head of our company, you know, 'Don't talk about this.' Look, I do my show. If they want to fire me, they can, but no meathead, no meathead is going to physically threaten my life and alter this program."

"I am simply not going to alter this program. I am not gonna do it because some man waits for me by the elevator this morning at 5:00 in the morning, and threatens me. I'm just not gonna do it. And if it means I'm gonna get beat up, whatever, I don't care."

"I had a crazed experience with him. He was gunning for me. He waited for me today and wanted to attack me. And I, I believe if I would have had Turd with me as a witness who he kept looking at. I'm like, oh, man. But he threatened me physically."

"I think he's a dangerous individual."

"He threatened me. Then he threatened me to a lot of people. Then he threatened some of my staff members. He's on the phone with the boss every day. Today, he waited for me . . . I get off the elevator and there he is waiting or me, cursing, saying he's going to beat me up."

"That happened after the threats were made. I didn't do that [the Christmas album] until he threatened to kick my ass. None of that was done until after I was threatened. And at that point, I wasn't willing to back down."

"Keith Van Horne met me at the elevator because we've been teasing him."

"And now, he says he's going to beat my ass, and he was getting real violent on me."

14. Throughout his four and one-half hour program, Muller painted a picture of Van Horne as a violent man who is a danger to society and intends to inflict harm on Muller and other individuals. Muller stated:

"He is completely out of control, and I am—I'm pleading, and I'm really begging the authorities. I'm not worried about me. . . . If I died, who would really care? . . . But I'm worried about the family. I'm worried about some woman, some mother who is going to get in the next traffic problem with him. And I've seen it. I've seen his violence. I saw it this morning first hand. He is a violent man. I witnessed it. I'm sorry. He can have his lawyers call me some more. I saw it. He threatened me today. And I'm worried about the woman that he hurts. I'm worried about the child that he hurts. This man needs to be locked up and I just want the authorities of Chicago to know. I'm gonna feel horrible because I believe its gonna happen."

"He is a danger to society and I'm worried. Look, it's okay. If I get hurt, big deal and I wouldn't be surprised, but he's gonna end up killing somebody. . . It wouldn't surprise me if he ends up killing somebody, and next time somebody cuts him off on the road—and I've seen his violent side—next time, he's gonna kill somebody. And I hope the cops are aware of this and I'm gonna notify the authorities after this program."

"I really don't want to give him publicity. . . I can't get on and be all smiles after someone has threatened my life."

"I believe the man is on the edge. I believe he's, he's psychotic. And I think, look, I don't care about

me. . . I'm worried about the family that he's gonna hurt. I saw it today. I saw the evil. This is a man who's in big trouble. He needs help. He needs mental help. . . I'm worried about the next woman that cuts him off in traffic. I'm worried about the family. I don't have a family. I'm worried about some bread earner that he kills. And I think he's capable of it. Personally, I think he's capable of it."

"I'm going to lose, but I'm going to fight back. He's not going to push me. He's not going to bully me and change this show. Nobody can do that. Some corporate weasel sitting down the hall in an office can't do it, and Keith Van Horne, memos and strong arm tactics, it doesn't work."

"Today, I'm going to seek legal help. I'm going to file a restraining order, and I'm going to notify the police."

"This is where he was waiting for me today. This is where he tried to victimize me and brutalize me today. He knows his way around this building"

"Well, we got this meathead football player—I'm sure you heard about it—trying to come after me."

"I've got to tell you after what I saw this morning, the violence that he displayed towards me, the aggression . . ."

15. Muller continued to recapitulate variations of his story about his alleged confrontation with Van Horne earlier that morning. At approximately 8:35 a.m., Muller informed his listeners:

"If you're just waking up and you don't know what's going on, this morning, Keith Van Horne was waiting for me. He was ready to go nuts on me. . . You know, 5:00 in the morning, we get off the elevator, and there's Keith Van Horne."

"Cursing and yelling and out of control. His eyes were bloodshot."

"His lips were flared. This guy is nuts, and I'm worried about the people that he's going to hurt. This man is a danger to society. I have never seen such violence."

"I believe this thing is going to end with violence, and if you find my body, Irma, somewhere. If they—would you just remember? Just kind of push the Chicago PD in the direction of the Van Horne mansion?"

"If they find my body in a sewer in the next 24 hours, somebody say it could be Van Horne. The man is nuts."

16. At approximately 8:55 a.m., Muller beseeched Van Horne to respond to his defamatory remarks. Muller stated:

"The challenge is still on to Mr. Van Horne who did threaten my life this morning and was violent and out of control. I believe he's a dangerous man. He can still remedy to this. We can do this without lawyers. We can do this without physical violence, Keith. Five minutes now until 9:00. You've got an hour and five minutes. You know where the studio is. You were waiting for me this morning. Find your way back here if you can and—huh, huh?—and let's talk this out like grown men."

17. The above statements imputed to Van Horne the crimes of stalking, intimidation, and assault. Such statements were false, known to be false by Muller when spoken, and constitute defamation *per se*.

18. In truth, Van Horne neither waited for Muller to arrive at work, nor chased Muller, nor attacked

Muller, nor threatened Muller in any way. Muller intentionally fabricated these claims and thereby acted with actual malice and reckless disregard for the truth.

19. In correspondence from Van Horne's attorneys to the President of Evergreen, James de Castro, and to Michael Fowler, the General Manager of WRCX, Van Horne requested a public retraction to be read by Muller on his show, as well as an apology.

20. Through Mr. de Castro and Mr. Fowler, Evergreen and WRCX informed Van Horne's attorneys that no retraction would be forthcoming.

21. Muller's comments as broadcast by WRCX and Evergreen were false and were made with actual malice and reckless disregard for the truth. Muller fabricated the alleged stalking, intimidation, attack, and threats by Van Horne and the other statements regarding Van Horne in the broadcast, and knew of their falsity at the time of their publication.

22. Van Horne is entitled to recover presumed damages in excess of $30,000 and, given the wilful, malicious nature of Muller's statements as alleged above, Van Horne is entitled to recover punitive damages in an amount in excess of $5,000,000.

WHEREFORE, Plaintiff Keith Van Horne prays for entry of a money damage judgment in his favor and against Matthew "Mancow" Muller in excess of $30,000, including punitive damages in excess of $5,000,000, plus costs of suit, and any other relief the Court deems appropriate.

Count II
Defamation Per Se
(Against Blanco)

23. Van Horne realleges paragraphs I through 22.

24. Blanco was Muller's newscaster and sidekick at KYLD (f/k/a KSOL) in San Francisco and followed him to WRCX, where she continues to function as his newscaster and sidekick on Mancow Muller's Morning Madhouse.

25. Throughout the November 11, 1994 broadcast, Blanco interacted with Muller. She and Muller engaged in constant banter in which Blanco contributed to and supported Muller's accounts of his alleged altercation with Van Horne. For example, Blanco participated in the following exchange:

> Muller: Look, I'm not—I'm not a chicken, but this man is gigantic. And I can't—I can't come to work and have somebody waiting for me outside—
>
> Blanco: Of course not.
>
> Muller: —the elevator, threatening my life.
>
> Blanco: That's ridiculous.

26. Later in the broadcast, Blanco helped Muller recount his tale of Van Horne's stalking, intimidation, and assault of Muller that morning and affirmed Muller's story:

> Blanco: Well, from what you were telling me—
>
> Muller: Everybody is talking about it.
>
> Blanco: Everybody is talking about it.
>
> Muller: The news director of the radio station saw it and talked about it, a lot of people were in the hall. We had, I don't know, maybe over 10

people, I don't know, a bunch of people in the hall. And he was waiting for me. And I don't think if I would have—if there—I—I think he would have would have hurt me if there wouldn't have been anybody around.

Blanco: If it was just the two of you, I really believe that.

Muller: Yeah.

Blanco: But you got on the elevator with your best friend who's visiting from town, and—

Muller: Yeah.

Blanco: —and Turd was there with you.

Muller: Yeah. Our man, Turd.

Blanco: And yeah, Keith Van Horne was leaving the building.

Muller: He is the former Bear lineman—

Blanco: Right.

Muller: He is a violent, out-of-control individual, and I am pleading with the authorities to put this man in jail. He is a danger to society. He threatened me physically, uh, you know, he's just—he's a gigantic meathead.

Blanco: He called you names.

Muller: . . . Uh, he threatened me, and I said let's talk about this. "We're not gonna talk, we're gonna (inaudible)."

Blanco: Yeah. Well, we offered him. We've offered him many times to come onto the air with us.

Muller: Yeah. You've gone to him.

Blanco: I've gone to him a couple of times, and he just said he didn't want to, that he was gonna have his lawyers—

Muller: Yeah, yeah.

Blanco: —handle this whole thing.

Muller: Well, he's not gonna let his lawyers handle things.

Blanco: And unfortunately, he should have let his lawyers, cause he didn't handle it.

Muller: No. Yeah, he should have.

Blanco: Because now he's really made things worse.

Muller: . . . Told people "Tell Mancow I'm going to kill him." He threatened me.

Blanco: Yeah.

27. At approximately 6:40 a.m., Blanco again affirmed Muller's contention that Van Horne had stalked and assaulted him:

Muller: All night. All right. I mean, it was just an amazing thing this morning.

Blanco: It happened this morning just as you were getting out of the elevator. It's almost as if he was waiting for you.

Muller: Oh, he was waiting.

Blanco: Threatening.

28. Later during the broadcast, Blanco informed WRCX listeners that Muller's story about his alleged confrontation with Van Horne was truthful. According to Muller and Blanco:

Muller: Now, you know, this is my show and people are going to think, aw, this is some kind of radio stunt. . . . Some kind of fixed fight other people—

Blanco: This is not a stunt.

29. During Muller's November 11, 1994 radio show, WRCX broadcast the news once every hour through Blanco. During each news broadcast, Blanco reported Muller's false account of his encounter with Van Horne as factual and as news. WRCX broadcast Muller's defamatory tale, as reported by Blanco, as the lead news item in three out of four of its news broadcasts during Muller's show. At approximately 6:01 a.m., Blanco reported:

> "Rock on the 3.5, good morning. It is now 6:01. For Mancow's Morning Madhouse, I'm Irma Blanco and here's the latest brought to you by Circuit City. Keith Van Horne's violent side was shining through this morning shortly after 5:00 a.m. in the John Hancock building. Former Bears lineman Van Horne, who is already in a little bit of trouble for allegedly hitting a woman at a gas station, literally ran into Mancow at the elevators in the building, with a near brawl with Van Horne threatening Mancow's life, calling him names, and even talking about a lawsuit. The whole thing fizzled out when Mancow graciously offered Van Horne time on the show this morning to air out the differences. Van Horne refused and left the building."

30. At approximately 6:58 a.m., Blanco began WRCX's news broadcast with the following report:

> "Rock, 103.5 update. Good morning. It is now 6:58 for Mancow's morning madhouse. I'm Irma Blanco, and here is the latest brought to you by Robert Morris College. Keith Van Horne's violent side was shining through earlier this morning shortly after 5:00 a.m. at the John Hancock building. Former Bears lineman, Keith Van Horne, who is already in a little bit of trouble for allegedly hitting a woman at a gas station a couple weeks ago, literally ran

into Mancow Muller this morning at the elevators. It was a near brawl with Van Horne threatening Mancow's life, calling him names, and even talking about a lawsuit. The whole thing finally fizzled out but only after Mancow graciously offered Van Horne time on the show this morning to air out their differences. That's when Van Horne said 'no, no, I gotta go.' He left the building."

31. At approximately 7:53 a.m. Blanco again reported the news, and as one of the top stories, stated:

Blanco: Rock 103.5 update. Good morning. It is now 7:53 from Mancow's morning madhouse. I'm Irma Blanco and here's the very latest brought to you by Just Tires. . . . Keith Van Horne's violent side shining through this morning just after 5:00 this morning in the John Hancock building. Former Bears lineman Van Horne, who is already in a little bit of trouble for allegedly hitting a woman at a gas station, he literally ran into Mancow night at the elevators. And it was a near brawl with Van Horne. He was threatening Mancow's life, calling him names, even talked about a lawsuit. The whole thing definitely fizzled out and right about the time when Mancow offered Van Horne to come on the air and to clear out all the differences.

Muller: No, he wouldn't do that. No.

Blanco: To kind of clear his name about the whole thing that happened at the gas station. That's when Van Horne said "no, I'd rather not" and he left. Jumped on the elevator and took off.

32. At or about 8:54 a.m., Blanco again reported WRCX's lead news story, with interruptions from Muller:

Blanco: Rock, 103.5 update. Good morning. It is now 8:54 from Mancow's morning madhouse. I'm

Irma Blanco, and here's the very latest brought to you by Sears Home Improvement. Keith Van Horne is showing his horns. The former Bears lineman is already in trouble for allegedly hitting a woman at a gas station.

Muller: Wait, wait, wait, wait, wait, wait, wait, wait. Wait, Suzy Brokenjaw, good job. Wow, Keith, I like that lead. You're ready for Hardcopy, sister. I'm sorry. Start over. Wait, wait, here, here. Here we. Okay. Now, just start over completely.

Blanco: Keith Van Horne is showing his horns. The former Bears lineman is already in trouble for allegedly hitting a woman at a gas station. Well this morning things got pretty ugly. Van Horne met Mancow at the elevators.

Muller: Yeah.

Blanco: And threatened Cow's life. He called you names. He even talked about a lawsuit. And the whole thing fizzled out when Mancow Muller graciously offered Van Corne—Van Horne oops

Muller: Van Dummy.

Blanco: —some time, some time on the show this morning.

Muller: Yeah.

Blanco: So that he can actually clear things up. So the two of you can actually talk.

Muller: Yes.

Blanco: Van Horne completely refused. He left the building. Is the offer still open? It's 9:00.

33. All of the above statements were reported as factual and as news during Muller's show and are defamatory *per se*.

34. Blanco's "factual" accounts, news reports, and participation in Muller's defamatory statements referred to in Count I falsely attributed criminal conduct to Van Horne and published Muller's defamatory tale. Blanco's statements were knowingly false, were made with actual malice and reckless disregard for the truth, and constitute defamation *per se*.

35. Van Horne is entitled to recover presumed damages in excess of $30,000 and, given the wilful, malicious nature of Blanco's statements as alleged above, is entitled to recover punitive damages in excess of $5,000,000.

WHEREFORE, Plaintiff Keith Van Horne prays for entry of a money damage judgment in his favor and against Blanco in excess of $30,000 damages, plus punitive damages in excess of $5,000,000, costs of suit, and any other relief the Court deems appropriate.

Count III
Defamation Per Se
(Against WRCX)

36. Van Horne realleges paragraphs 1 through 35.

37. By its broadcast of Muller's and Blanco's false statements, WRCX is liable for its publication of such false statements.

38. WRCX permitted Muller and Blanco unfettered ability to maliciously defame and slander Van Horne over the public airwaves.

39. Van Horne is entitled to recover presumed damages in excess of $30,000 and, given the wilful, malicious nature of Muller's and Blanco's statements as

alleged above, is entitled to recover punitive damages in an amount in excess of $5,000,000.

WHEREFORE, Plaintiff Keith Van Horne prays for entry of a money damage judgment in his favor and against WRCX in excess of $30,000 damages, plus punitive damages in excess of $5,000,000, costs of suit, and any other relief the Court deems appropriate.

Count IV
Defamation Per Se
(Against Evergreen)

40. Van Horne realleges paragraphs I through 35.

41. Evergreen is liable for the conduct of its agents, WRCX, Muller, and Blanco with regard to Muller's and Blanco's false statements and WRCX's and Evergreen's broadcast and publication thereof.

42. Evergreen permitted Muller, Blanco, and WRCX unfettered ability to maliciously defame and slander Van Horne over the public airwaves.

43. Van Horne is entitled to recover presumed damages in excess of $30,000 and, given the wilful, malicious nature of Muller's and Blanco's statements as alleged above is entitled to recover punitive damages in an amount in excess of $5,000,000.

WHEREFORE, Plaintiff Keith Van Horne prays for entry of a money damage judgment in his favor and against Evergreen Media Corporation in excess of $30,000 damages, plus punitive damages in an amount in excess of $5,000,000, costs of suit, and any other relief the Court deems appropriate.

Count V
Negligent Hiring
(Against WRCX and Evergreen)

44. Van Horne realleges paragraphs 1 through 43.

45. WRCX and Evergreen had a duty to exercise reasonable care in the employment and selection of disc jockeys who will not recklessly or intentionally cause harm to Van Horne and other third persons via the public airwaves.

46. Before Evergreen and WRCX hired Muller as a disc jockey, Muller precipitated and engaged in a course of conduct during the course of his radio broadcasts which constituted outrageous, irresponsible, reckless, and malicious behavior. Such conduct received widespread media attention and proximately resulted in harm to third persons. Such behavior included, but was not limited to:

a. obstructing public access to the San Francisco Bay Bridge and causing a three-hour traffic Jam involving 35,000 commuters on May 26, 1993 so that Muller's KSOL (n/k/a KYLD) sidekick, Jesus "Chewy" Gomez, could get a haircut in a van stopped on the bridge. As a consequence of his conduct and plea of no contest to causing a public nuisance, Muller was fined $500, sentenced to 100 hours of community service, and sentenced to three years of probation by San Francisco Municipal Court, and was suspended from KSOL, a direct competitor of Evergreen-owned KSOL. As a further result of his extreme and outrageous conduct, Muller and KSOL are defendants in a $4 million public nuisance class action brought by injured commuters. In the course of his prosecution, Muller

apologized in public and stated, in words or substance, that he had "misjudged the power of radio";

b. broadcasting that the Golden Gate Bridge toll had risen from $3 to $5. Bridge officials reprimanded Muller because many KSOL listeners believed Muller's report and overpaid their tolls;

c. hanging a "Welcome to Chicago" banner over the receiving gates during the Christmas rush at San Francisco International Airport and watching travelers panic as they deplaned;

d. dropping cinder blocks off a California Bayshore overpass and causing damage to cars parked below;

e. harassing Cindy Carter, host of Soulbeat (an Oakland, California television program), by calling her "fat" and "unprofessional" over the public airwaves, broadcasting Soulbeat's phone number, and encouraging KSOL listeners to call and harass her;

f. causing KSOL listeners to storm the San Francisco State University library on March 4, 1994 by announcing during his program that $500 was hidden in a book;

g. designating "Alzheimer's Awareness Day" and visiting a geriatric center in San Francisco to mock aged individuals with the debilitating illness by asking them trivia questions they were unable to answer over the public airwaves.

47. Muller's history of outrageous, irresponsible, reckless, malicious, and illegal conduct was given extensive media coverage before WRCX and Evergreen hired Muller.

48. When WRCX and Evergreen hired Muller, they knew or should have known about Muller's history of

outrageous, irresponsible, reckless, malicious, and illegal conduct in the course of his radio broadcasts, the harm that such conduct has caused to third persons, and the legal consequences of his conduct, particularly since Muller was employed at a competitor of an Evergreen owned station in San Francisco.

49. When WRCX and Evergreen hired Muller, they breached their duty of reasonable care, given Muller's history of and propensity to engage in outrageous, irresponsible, malicious, reckless, and illegal conduct in the course of his radio broadcasts which repeatedly caused harm to third persons. WRCX and Evergreen actively courted Muller and hired him in spite of and as a consequence of his outrageous, irresponsible, reckless, malicious, and illegal conduct and the media attention generated by such conduct, and with disregard for the harm Muller's conduct had caused and would cause to third persons.

50. WRCX's and Evergreen's breach of its duty of reasonable care by hiring Muller, despite his history of and propensity to engage in outrageous, irresponsible, reckless, malicious, and illegal conduct in the course of his radio broadcasts, permitted Muller the unfettered ability to maliciously defame and slander Van Horne over the public airwaves and proximately caused damage to Van Horne's reputation.

WHEREFORE, Plaintiff Keith Van Horne prays for entry of a money damage judgment in his favor and against Evergreen Media Corporation in excess of $30,000, costs of suit, and any other relief the Court deems appropriate.

Count VI
Reckless Hiring
(Against WRCX and Evergreen)

51. Van Horne realleges paragraphs I through 48.

52. When WRCX and Evergreen hired Muller, they breached their duty of reasonable care and acted in reckless disregard for Muller's history of and propensity to engage in outrageous, irresponsible, reckless, malicious, and illegal conduct in the course of his radio broadcasts which repeatedly caused harm to third persons. WRCX and Evergreen actively courted Muller and hired him in spite of and as a consequence of Muller's outrageous, irresponsible, reckless, malicious, and illegal conduct and the media attention generated by such conduct and with reckless disregard for the harm Muller's conduct had caused and would cause to third persons.

53. WRCX's and Evergreen's breach of their duty of reasonable care and reckless disregard for Muller's history of and propensity to engage in outrageous, irresponsible, reckless, malicious, and illegal conduct in the course of his radio broadcasts permitted Muller the unfettered ability to maliciously defame and slander Van Horne over the public airwaves and proximately caused damage to Van Horne's reputation.

WHEREFORE, given WRCX's and Evergreen's reckless disregard for Muller's propensity to engage in outrageous, irresponsible, reckless, malicious, and illegal conduct, plaintiff Keith Van Horne prays for punitive damages against WRCX and Evergreen Media Corporation in an amount in excess of $5,000,000, costs of suit, and any other relief the Court deems appropriate.

Count VII
Negligent Supervision and Retention
(Against WRCX and Evergreen)

54. Van Horne realleges paragraphs 1 through 48.

55. WRCX and Evergreen had a duty to exercise reasonable care to supervise their disc jockeys and prevent them from recklessly or intentionally causing harm to Van Horne and other third persons via the public airwaves.

56. WRCX and Evergreen had a duty of reasonable care to refrain from retaining a disc jockey who, by continued employment, would recklessly or intentionally cause harm to Van Horne and other third persons via the public airwaves.

57. Since WRCX and Evergreen hired Muller, he has continued to engage in outrageous, irresponsible, reckless, malicious, and illegal conduct in the course of his radio broadcasts which has harmed third persons, including, but not limited to:

a. declaring a day "Roadkill Tuesday" and offering $103.50 to WRCX listeners who left dead animals at Frankfort's Town Center mall on September 6, 1994; listeners responded by depositing rotting animal carcasses at the mall; as a direct consequence of Muller's conduct, the city had to flush the area with chlorine and 3,000 gallons of water to prevent possible outbreaks of disease; WRCX was fined $500 and charged $505 for the cleanup;

b. offering female WRCX listeners $103 to ride the public transit system topless on or about September 16, 1994; one woman phoned the police after Muller's sidekick, Turd, approached her and asked her to remove her blouse;

c. directing his sidekick, Turd, to stand on the North Avenue bridge over Lake Shore Drive during Muller's broadcast in or about October, 1994 with a sign that read "Honk and we'll drop a cinder block"; police stormed the WRCX studio and stopped Muller's show; Turd was arrested, fined $800, and sentenced to 120 hours of community service and one year supervision; WRCX station manager Dave Richards was required to provide an on-air apology.

58. WRCX and Evergreen failed to supervise Muller, thus allowing him unfettered discretion and ability to engage in outrageous, irresponsible, reckless, malicious, and illegal conduct in the course of his radio broadcasts, and without regard to the potential harm such conduct has caused and would cause to third persons. Early on in Muller's employment with WRCX and Evergreen, Evergreen's president advised him, "[d]o whatever you want to do -just entertain, have fun." According to Muller, "[t]hey've given me a program director who keeps out of my face. I have complete freedom."

59. When WRCX and Evergreen failed to supervise Muller, they breached their duty of reasonable care, given Muller's history of and propensity to engage in outrageous, irresponsible, reckless, malicious, and illegal conduct in the course of his radio broadcasts which harms third persons.

60. When WRCX and Evergreen continued to retain Muller after he engaged in outrageous, irresponsible, reckless, malicious, and illegal conduct in the course of his radio broadcasts, they breached their duty of reasonable care, given the harm such conduct posed to third persons.

61. WRCX's and Evergreen's breach of their duty of reasonable care by failing to supervise Muller and re-

taining Muller despite his repeated displays of outrageous, irresponsible, reckless, malicious, and illegal conduct in the course of his radio broadcasts permitted Muller the unfettered ability to maliciously defame and slander Van Horne over the public airwaves and proximately caused damage to Van Horne's reputation.

WHEREFORE, plaintiff Keith Van Horne prays for entry of a money damage judgment in his favor and against Evergreen Media Corporation in excess of $30,000, costs of suit, and any other relief the Court deems appropriate.

Count VII
Reckless Supervision and Retention
(Against WRCX and Evergreen)

62. Van Horne realleges paragraphs 1 through 48 and paragraphs 55 through 58.

63. When WRCX and Evergreen failed to supervise Muller, they breached their duty of reasonable care and acted in reckless disregard for Muller's history of and propensity to engage in outrageous, irresponsible, reckless, malicious, and illegal conduct in the course of his radio broadcasts which harms third persons.

64. When WRCX and Evergreen continued to retain Muller after he engaged in outrageous, irresponsible, reckless, malicious, and illegal conduct in the course of his radio broadcasts, they breached their duty of reasonable care and acted in reckless disregard for the harm such conduct posed to third persons.

65. WRCX's and Evergreen's breach of their duty of reasonable care by failing to supervise Muller and re-

taining Muller despite his repeated displays of outrageous, irresponsible, reckless, malicious, and illegal conduct in the course of his radio broadcasts, and their reckless disregard for the harm Muller's conduct posed to Van Horne and other third persons, permitted Muller the unfettered ability to maliciously defame and slander Van Horne over the public air-waves and proximately caused damage to Van Horne's reputation.

WHEREFORE, given WRCX's and Evergreen's reckless disregard for Muller's repeated outrageous, irresponsible, reckless, malicious, and illegal conduct, plaintiff Keith Van Horne prays for punitive damages in an amount in excess of $5,000,000, costs of suit, and any other relief the Court deems appropriate.

KEITH VAN HORNE

By: /s/ Sheryl L. Jaffee
One of his attorneys

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VERIFICATION

Keith Van Horne, being first duly sworn upon oath, states that he has reviewed the foregoing Verified Second Amended Complaint and is familiar with the facts stated therein, and that the same are true and correct to the best of his knowledge and belief.

/s/ Keith Van Horne
Keith Van Horne

Signed and sworn to before me
the 6th day of July, 1995

/s/ Miroslava Kaplan

"OFFICAL SEAL"
Miroslava Kaplan
Notary Public, State of Illinois
My Commission Expires 8/7/96

(2)

Supreme Court, U.S.
FILED
JUN 1 1999
CLERK

No. 98-1745

In the

Supreme Court of the United States

October Term, 1998

KEITH VAN HORNE,

Petitioner,

v.

EVERGREEN MEDIA CORPORATION,
a Delaware corporation, and WRCX RADIO,

Respondents.

On Petition for a Writ of Certiorari
to the Supreme Court of Illinois

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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CORPORATE DISCLOSURE STATEMENT

Evergreen Media Corporation was a Delaware corporation. In 1997, Evergreen merged with Chancellor Media Corporation and changed its name to Chancellor Media Corporation. Chancellor Media Corporation has no parent company, and no publicly held company owns 10% or more of its stock.

RESPONDENTS' BRIEF IN OPPOSITION

The respondents, Evergreen Media Corporation, a Delaware corporation, and WRCX Radio, respectfully request that this Court deny the petition for writ of certiorari, seeking review of the Illinois Supreme Court's opinion in this case. That opinion is reported at 185 Ill. 2d 299, 705 N.E.2d 898 (1998).

The respondents incorporate the Background section of the Illinois Supreme Court's opinion as and for their Statement of the Case herein.

JURISDICTION

The Judgment of the Illinois Supreme Court was entered on December 3, 1998. Petitioner's Petition for Rehearing was denied on February 1, 1999. Jurisdiction is not proper under 28 U.S.C. § 1257 because as set forth more fully below, the Illinois Supreme Court's opinion was not a final disposition of the litigation, and even more importantly, was not decided on federal grounds. In fact, the Illinois Supreme Court refused to decide the federal question raised below, namely, whether the First Amendment allows a public figure, such as petitioner, to state a claim for negligent or reckless hiring, retention or supervision based upon an employee's defamatory conduct.

REASONS FOR DENYING THE WRIT

I. JURISDICTION IS NOT PROPER BECAUSE THE ILLINOIS SUPREME COURT'S DECISION IS NOT A FINAL DECISION DISPOSING OF ALL ISSUES IN THE CASE.

Van Horne's petition is directed to the Illinois Supreme Court's reversal of the Illinois Appellate Court's reinstatement of Counts V - VIII of his second amended complaint. Under the final judgment rule, this Court's jurisdiction to review the decision of a state court is limited to reviewing final judgments. 28 U.S.C. § 1257(a) (1993). The rule requires that a state court decision be final in two ways: first, it must not be subject to any further review

in any other state court, and second, "it must be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein." *Jefferson v. City of Tarrant*, 522 U.S. 75, 118 S. Ct. 481, 486 (1997), *quoting Market Street R. Co. v. Railroad Comm'n of Cal.*, 324 U.S. 548, 551, 65 S. Ct. 770, 773 (1945).

Although the Illinois Supreme Court's decision is a final judgment relating to the negligent employment claims (Counts V-VIII), the case has been remanded for trial of Van Horne's defamation claims and is not a final determination of the litigation warranting review in this Court. The case came to the Illinois Supreme Court at the pleadings stage and is merely an interlocutory appeal; it does not dispose of the litigation in its entirety. On the contrary, Counts I, III and IV of the complaint were never at issue on the appeal, and Count II has now been remanded for trial with Van Horne's other defamation claims. Moreover, after the Illinois Supreme Court issued its ruling, Van Horne filed his fourth amended complaint, in which he asserted additional defamation claims and new claims for negligent and reckless supervision and retention. The case is set for trial on March 15, 2000.

Additionally, the injury to reputation that Van Horne has pled in his defamation claims is identical to the reputation injury alleged in his negligent employment claims. Thus, if the jury finds that he has not suffered any injury to his reputation at the trial on his defamation claims, the impact of the opinion below will be moot because Van Horne will be unable to prove the injury element of his negligent employment claims. Because Van Horne's appeal is not based on a final disposition, and in the interests of judicial economy, the petition for certiorari should be dismissed for lack of jurisdiction under 28 U.S.C. § 1257(a).

II. JURISDICTION IS NOT PROPER BECAUSE THE ILLINOIS SUPREME COURT'S DECISION WAS BASED SOLELY ON ILLINOIS LAW.

Van Horne contends that the Illinois Supreme Court has given media employers a license to avoid laws of general application by heightening the pleading requirements for them in negligent

employment cases. (Pet. for Cert. at 9). He has asked this Court to decide whether the First Amendment permits special burdens of pleading and proof for media employers in negligent hiring, supervision and retention cases. In its opinion below, however, the Illinois Supreme Court expressly declined to decide the questions presented by Van Horne. Indeed, the court found that Van Horne had not, and could not, properly allege the element of proximate cause in the negligent employment counts of his complaint. The decision was squarely based on state tort law.

The Illinois Supreme Court found that, although Van Horne alleged that Evergreen and WRCX were aware that Muller had previously made outrageous, and perhaps even offensive, remarks as a broadcaster, Van Horne did not allege that Muller had ever made false or defamatory statements. The court concluded that Evergreen and WRCX therefore could not have been on notice that Muller was likely to make false, defamatory statements in his position as a broadcaster. (App.1 at 15a-16a). The court was careful to limit its holding, stating: "[w]e hold only that this cause of action may not be premised solely on allegations that an employer hired an employee who had previously engaged in controversial, but nondefamatory, speech conduct." *Id.*

To state a claim for negligent hiring, retention or supervision in Illinois, a plaintiff must allege that the employer "knew or should have known that the employee in question had a particular unfitness for the position so as to create a danger of harm to third persons." *Mueller v. Community Consol. School Dist. 54*, 287 Ill. App. 3d 337, 341-42, 678 N.E.2d 660, 663 (1st Dist. 1997), *citing Fallon v. Indian Trail School*, 148 Ill. App. 3d 931, 935, 500 N.E.2d 101, 103-04 (2d Dist. 1986), *appeal denied*, 114 Ill. 2d 544, 508 N.E.2d 727 (1987). "Liability for negligent hiring arises only when a particular unfitness of an applicant creates a danger of harm to a third person which the employer knew, or should have known, when he hired and placed th[e] applicant in employment where he could injure others." *Fallon*, 148 Ill. App. 3d at 935, 500 N.E.2d at 103-04. In reversing the Appellate Court and dismissing Counts V – VIII of the complaint, the Illinois Court merely held that Van Horne failed to allege that Muller had ever exhibited a

particular unfitness for his position as a broadcaster which exposed Van Horne to a foreseeable risk of being defamed.

Other Illinois courts have similarly dismissed negligent hiring, retention and supervision claims for failure to allege that an employee's particular unfitness created a foreseeable risk of harm to third parties. *Mueller*, 287 Ill. App. 3d at 342, 678 N.E.2d at 664-65 (upholding dismissal of negligent hiring, retention and supervision claims because complaint failed to allege that employer's negligence proximately caused plaintiff's injury); *Fallon*, 148 Ill. App. 3d at 935, 500 N.E.2d at 103-04 (upholding dismissal of complaint because complaint did not establish that employees' unfitness created particular risk of harm to plaintiff). *See also Giraldi v. Community Consol. School Dist. #62*, 279 Ill. App. 3d 679, 692, 665 N.E.2d 332, 340 (1st Dist. 1996) (upholding directed verdict for defendant where plaintiff failed to show that employee's unfitness, a tendency to run late, was a proximate cause of plaintiff's sexual assault), *appeal denied*, 168 Ill. 2d 589, 671 N.E.2d 730.

The Illinois Court's decision below was based on the principles of Illinois tort law enunciated in cases like *Fallon* and *Giraldi*. Because the court found the complaint deficient in alleging the element of proximate cause, it never reached the issue of whether, and to what extent, the First Amendment limits a negligent employment claim based on an employee's defamatory statements. The Illinois Supreme Court decided the case solely on state tort law grounds, and Van Horne's petition should therefore be dismissed for lack of jurisdiction.

III. THE ILLINOIS COURT'S OPINION DOES NOT CREATE HIGHER BURDENS FOR PLAINTIFFS WHO FILE NEGLIGENT EMPLOYMENT ACTIONS AGAINST MEDIA EMPLOYERS.

By contending that the Illinois Supreme Court has carved out a special exception in negligent employment cases for media employers, Van Horne has attempted to create a First Amendment issue where none exists. If anything, the opinion is in accord with the principle articulated by this Court in *Hustler v. Falwell*, 485 U.S. 46, 108 S. Ct. 876 (1988), that plaintiffs are not

constitutionally permitted to recover damages for reputational harm through the vehicle of other torts. Van Horne asserts, however, that the Illinois Supreme Court's opinion contravenes this Court's decision in *Cohen v. Cowles Media Co.*, 501 U.S. 663, 111 S. Ct. 2513 (1991). (Pet. for Cert. at 9). In *Cohen*, this Court held that the First Amendment does not protect the media from the application and enforcement of general laws.

The *Cohen* analysis is entirely inapplicable here, however, because the Illinois Supreme Court's decision does not create any special protections for media employers. The court simply held that a cause of action for negligent hiring, retention or supervision "may not be premised solely on allegations that *an employer* hired an employee who engaged in controversial, but nondefamatory, speech or conduct." (App.1 at 16a (emphasis supplied)). Although media employers are often susceptible to liability for an employee's defamatory statements, the Illinois Supreme Court's decision does not single out media employers for special treatment. Rather, the opinion merely echoes the general principle of tort law that, in negligent employment, there must be some nexus between the employee's past conduct and the conduct giving rise to the tortious injury. Under any construction, the Illinois Supreme Court was careful to avoid the broad-brush ruling that Van Horne now ascribes to it. This Court need not address principles of First Amendment jurisprudence that are not implicated by the lower court's ruling.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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